IN THE MICHIGAN SUPREME COURT

Appeal from the Michigan Court of Appeals
Sawyer, PJ, and Murphy and Hoekstra, JJ

In the Matter of SANDERS, Minors

Circuit Court No.: 11-2828-NA
Court of Appeals No.: 313385
Supreme Court No.: 146680

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AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN

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QUESTION PRESENTED FOR REVIEW

In *Stanley v Illinois*, 405 US 645; 92 S Ct 1208; 31 L Ed 2d 551 (1972), the United States Supreme Court held that a parent cannot be denied rights to his or her children without a hearing on parental fitness. Michigan law affords parents the right to an adjudication trial, before a jury or a judge, before a court can assume jurisdiction over their children. Did the trial court's application of the so-called "one parent" doctrine, first adopted in *In re CR*, 250 Mich App 185; 646 NW2d 506 (2001), and assumption of jurisdiction in this matter, violate federal due process?

Trial court held: No.
Father-Appellant answers: Yes.
Department of Human Services answers: Failed to answer.
LGAL-Appellee answers: No.
Amicus Curiae NACC answers: Yes.

STATEMENT OF INTEREST OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN

Amicus curiae National Association of Counsel for Children ("NACC") submits this brief to the Michigan Supreme Court in *In re Sanders*. Founded in 1977, the NACC is a 501(c)(3) non-profit child advocacy and professional membership association dedicated to enhancing the well being of America's children. The NACC works to strengthen the delivery of legal services to children, enhance the quality of legal services affecting children, improve courts and agencies serving children, and advance the rights and interests of children. NACC programs that serve these goals include training and technical assistance, the national children's law resource center, the attorney specialty certification program, the model children's law office program, policy advocacy, and the *amicus curiae* program.

Through the *amicus curiae* program, the NACC has filed numerous briefs involving the legal interests of children in state and federal appellate courts and the Supreme Court of the United States. The NACC uses a highly selective process to determine participation as *amicus curiae*. *Amicus* cases must pass staff and Board of Directors review using the following criteria: the request must promote and be consistent with the mission of the NACC; the case must have widespread impact in the field of children's law and not merely serve the interests of the particular litigants; the argument presented must be supported by existing law or a good faith extension of the law; and there must generally be a reasonable prospect of prevailing. The NACC is a multidisciplinary organization with approximately 2,000 members representing all fifty states and the District of Columbia. NACC membership is comprised primarily of attorneys and judges, although the fields of medicine, social work, mental health, education, and law enforcement are also represented.

The NACC submits this *amicus curiae* brief on behalf of the interests of children in having the best and most appropriate outcomes in child protective proceedings. The NACC has opposed the "one parent doctrine" in several *amicus curiae* briefs filed in other appeals. See, e.g., *In re Mays* (SC 142566); *In re Moore* (COA 298008); *In re Bratcher* (COA 295727). In this context, the NACC requests that the Court hold that the "one parent doctrine" is unconstitutional, reverse the trial court's order in this matter, and remand the matter for further proceedings consistent with such a holding.

I. INTRODUCTION

The United States Constitution, through the Due Process Clauses of the Fifth and Fourteenth Amendments, recognizes a presumption that a child's parents are fit. As Justice O'Connor explained in *Troxel v Granville*, there is "a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions." 530 US 57, 68; 120 S Ct 2054; 147 L Ed 2d 49 (2000) (plurality opinion) (internal quotation marks omitted). The Constitution further recognizes "a presumption that fit parents act in the best interests of their children." *Id.* These are fundamental principles undergirding our constitutional system.[1]

Michigan courts violate these principles when they presume the *opposite* with regard to a parent who has done nothing wrong (the "non-offending parent") but who unfortunately shares parental rights with someone who *has* done something wrong (the "offending parent"). Michigan trial courts do *not* presume that a non-offending parent is fit or that a non-offending parent will act in the best interest of his or her child. Rather, by operation of the so-called "one parent doctrine" first adopted in *In re CR*, 250 Mich App 185; 646 NW2d 506 (2001), Michigan trial courts improperly assume the role of a parent and exercise jurisdiction over a child without any prior adjudication of a non-offending parent's fitness. In so doing, trial courts violate the due process rights of the non-offending parent and often act against the best interests of the child.

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[1] Justice O'Connor announced the judgment of the Court and authored an opinion joined by Chief Justice Rehnquist and Justices Ginsburg and Breyer. *Troxel, supra* at 59. Justice Thomas authored a concurring opinion in which he "agree[d] with the plurality that this Court's recognition of a fundamental right of parents to direct the upbringing of their children resolves this case." *Id.* at 80 (Thomas, J, concurring in the judgment). Justice Thomas took issue with both the plurality and the dissent for failing to "articulate[] the appropriate standard of review" and he would have "appl[ied] strict scrutiny to infringements of fundamental rights." *Id.* It seems clear, therefore, that Justice Thomas agreed with the plurality's discussion of prior Supreme Court precedent that established these fundamental presumptions about parents, children, and families.

The Michigan Supreme Court has noted that "[t]he constitutionality of the 'one parent doctrine' is obviously a jurisprudentially significant issue." *In re Mays*, 490 Mich 993, 994 n 1; 807 NW2d 307 (2012). While Michigan courts have engaged in "widespread application of this doctrine," *id.*, the constitutionality of the doctrine has never been resolved. Retired Justice Marilyn Kelly has described this circumstance as "the elephant in the room." *Id.* at 995 (Kelly, J, concurring). It is time that this Court resolves, once and for all, the constitutionality of the doctrine so that children, parents, child welfare agencies, and lower courts have clear and constitutionally firm standards to follow.

II. BACKGROUND

The NACC adopts the Statements of Jurisdiction and Material Proceedings and Facts found in Respondent-Appellant's Brief.

III. ANALYSIS

A. Parents and Their Minor Children Enjoy Due Process Rights

The rights of minor children and parents are protected by the Due Process Clause of the Fourteenth Amendment. *Santosky v Kramer*, 455 US 745, 752–54 & n7; 102 S Ct 1388; 71 L Ed 2d 599 (1982). "Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v Eldridge*, 424 US 319, 332; 96 S Ct 893; 47 L Ed 2d 18 (1976).

The specific contours that these due process protections take must be considered not in the abstract but, rather, with due regard for "the precise nature of the government function involved as well as the private interest that has been affected by governmental action." *Stanley v Illinois*, 405 US 645, 650–51; 92 S Ct 1208; 31 L Ed 2d 551 (1972). Accordingly, a review of

"first principles" as to a child's best interests, a parent's interests, and the government's role in furthering those and society's interests, is instructive.

First. **The Interests of a Child Are of Paramount Importance.** A minor child is a vulnerable member of society and, as such, is deserving of special protection. *See id.* at 652. Courts have recognized this by noting that the best interests of a child are of paramount importance to society. *Lassiter v Dep't of Social Servs*, 452 US 18, 28; 101 S Ct 2153; 68 L Ed 2d 640 (1981) ("[T]he State has an urgent interest in the welfare of the child."); *In re Irwin*, No 229012, 2001 WL 793883, at *5 (Mich App, July 13, 2001) (attached as **Exhibit A**) ("[T]he primary focus of a child protective proceeding is the health, safety, and well-being of children.").

Second. **The Interests of the Child Are Best Protected by a Fit Parent, Who Also Has His or Her Own Protected Interests in the Familial Relationship.** The interests of a child and the interests of a *fit* parent are perfectly aligned under the law. To suggest the opposite—that a child's interests diverge from those of a fit parent—is a constitutional paradox. Both the Fifth Amendment and the Fourteenth Amendment recognize and provide "'heightened protection against governmental interference'" in "[t]he liberty . . . interest of parents in the care, custody, and control of their children." *Troxel*, *supra* at 65 (O'Connor, J) (plurality opinion) (quoting *Washington v Glucksberg*, 521 US 702, 720; 117 S Ct 2258; 138 L Ed 2d 772 (1997)). The U.S. Supreme Court has "recognized on numerous occasions that the relationship between parent and child is constitutionally protected." *Quilloin v Walcott*, 434 US 246, 255; 98 S Ct 549; 54 L Ed 2d 511 (1978). This liberty interest "is perhaps the oldest of the fundamental liberty interests recognized by this Court," *Troxel*, *supra* at 65 (O'Connor, J) (plurality opinion), and "is an interest far more precious than any property right," *Santosky*, *supra* at 745.

The Constitution protects not only the parent's right to be a parent, but also the right to custody of his child. "'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.'" *Stanley*, *supra* at 651 (quoting *Prince v Massachusetts*, 321 US 158, 166; 64 S Ct 438; 88 L Ed 645 (1944)). A parent's "interest in retaining custody of his children is cognizable and substantial." *Id.* at 652.

Importantly, not only does this fundamental liberty interest protect the rights of a parent, but, as the U.S. Supreme Court has recognized on several occasions, it promotes the best interests of the parent's child. *See, e.g.*, *Troxel*, *supra* at 68 (O'Connor, J) (plurality opinion) ("[N]o court has found[] that [the parent] was an unfit parent. That aspect of the case is important, for there is a presumption that fit parents act in the best interests of their children."). In *Parham v JR*, the U.S. Supreme Court recognized this link between a parent's custody and the best interests of his or her child:

> Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course; our constitutional system long ago rejected any notion that a child is "the mere creature of the State" and, on the contrary, asserted that parents generally "have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations." *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925). See also *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923). . . . The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children. 1 W. Blackstone, Commentaries *447; 2 J. Kent, Commentaries on American Law *190.
>
> As with so many other legal presumptions, experience and reality may rebut what the law accepts as a starting point; the incidence of child neglect and abuse cases attests to this. That some parents "may at times be acting against the interests of their children" as was stated in *Bartley v. Kremens*, 402 F. Supp. 1039, 1047-1048 (ED Pa. 1975), *vacated and remanded*, 431 U. S. 119 (1977), creates a basis for caution, but is hardly a reason to discard wholesale those pages

> of human experience that teach that parents generally do act in the child's best interests. See Rolfe & MacClintock 348–49. The statist notion that governmental power should supersede parental authority in all cases because some parents abuse and neglect children is repugnant to American tradition. [442 US 584, 602–03; 99 S Ct 2493; 61 L Ed 2d 101 (1979).]

The private interest at stake here, that of a father in his children, "undeniably warrants deference and, absent *a powerful countervailing interest*, protection." *Stanley*, *supra* at 651 (emphasis added); *cf. Santosky*, *supra* at 760 ("But until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship.").

Third. **If No Fit Parent Is Available, the Government Must Protect the Child's Interests.** As explained above, there is no doubt that a child's interest is paramount. One of the fundamental objectives of any government—federal, state or local—is to ensure that those interests are protected. *Santosky*, *supra* at 766 (noting that one state interest in parental rights cases is "a *parens patriae* interest in preserving and promoting the welfare of the child"). The State of Michigan statutorily recognizes the importance of a child's welfare: "This chapter [dealing with juveniles] shall be liberally construed so that each juvenile coming within the court's jurisdiction receives the care, guidance, and control, preferably in his or her own home, conducive to the juvenile's welfare and the best interests of the state." MCL 712A.1(3). There is no question that if a fit parent is unavailable, then the government must step in and take custody of that child, at least temporarily until a more suitable option is found.

Fourth. **If There Is a Fit Parent, the Government Cannot Assume Custody and Control of the Child.** As between the choice of (a) a fit parent and (b) a state agency or court acting in *parens patriae*, the Constitution conclusively favors the former. "[W]hile there is still reason to believe that positive, nurturing parent-child relationships exist, the *parens patriae*

interest favors preservation, not severance, of natural familial bonds." *Santosky*, *supra* at 766–67 (footnote omitted) (citation omitted). "[S]o long as a parent adequately cares for . . . [his] children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of [his] children." *Troxel*, *supra* at 68–69 (O'Connor, J) (plurality opinion).

The U.S. Supreme Court has explained that the interest of the government in the care of a child is actually quite low when there is a fit parent available. In *Stanley*, the Court characterized the government's interest in the care of a parent's child as "*de minimis* if [the parent] is shown to be a fit [parent]." *Supra* at 657–58. This minimal interest cannot justify a government inserting itself between a fit parent and his or her child by assuming custody of that child. This would permit a government's "*de minimis*" interest to override the "cardinal" interest of a parent, *id.* at 651, 657, an outcome the Due Process Clause could not countenance. As the *Stanley* Court stated, "[The] State registers no gain towards its declared goals when it separates children from the custody of fit parents." *Id.* at 652. Similarly, as Justice O'Connor explained in *Troxel*, "[T]he Due Process Clause does not permit a State to infringe on the fundamental right of parents to make childrearing decisions simply because a state judge believes a 'better' decision could be made." *Troxel, supra* at 72–73; *see also id.* at 67–68 (noting that the state statute at issue instructed the trial court to be guided by the "best interest of the child" when determining which non-parent relative should be granted visitation rights, but concluding that the trial court's view must not be permitted to supersede "the decision by a fit custodial parent").

Fifth. **The Familial Relationship of a Parent and His or Her Child Is Too Fundamental to Suppress on the Basis of Speed and Efficiency.** The final factor to consider

in determining the contours of the process due a parent in a particular circumstance is the impact on the public purse. In general, "the Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources is a fact that must be weighed." *Mathews*, *supra* at 348. Yet, "speed and efficiency" cannot trump either a fit parent's interest in raising his or her child or his or her child's interest in being raised by a fit parent:

> [T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones. [*Stanley*, *supra* at 656 (footnote omitted).]

B. From First Principles to Necessary Conclusion: A Parent's Rights in His or Her Children Cannot Be Infringed upon Without a Fitness Adjudication

A review of these principles of constitutional due process establishes the following: (1) the interests of children are of paramount importance; (2) these interests are best protected by a fit parent who also has his or her own independent interests in his or her child; (3) when a fit parent is unavailable, the government must intervene and act in *parens patriae* to protect a child's best interests; (4) if there is a fit parent available, the government cannot assume custody and control over a child; and (5) speed and efficiency alone cannot justify the government assuming custody over a child without first ascertaining whether that child has a fit parent. From these principles, it is axiomatic that the government cannot presume that a parent is unfit, but rather must adjudicate a parent's fitness *before* taking jurisdiction over the child and imposing arduous requirements to maintain or obtain custody.

In this case, the trial court's objective of protecting children is unquestionably paramount. However, as in *Stanley*, "the legitimacy" of this "state end[]" is not at issue in this case. *Stanley*, *supra* at 652. Rather, this Court must "determine whether the *means* used to achieve th[is] end[] are constitutionally defensible." *Id.* (emphasis added).

Mirroring the U.S. Supreme Court's analysis in *Stanley*, it may well be that, in circumstances where a child has an offending parent, the non-offending parent may be unfit. *Id.* at 654. Here, it may well be that Mr. Laird is just such an unfit parent and that he should have been required to comply with various requirements to show that he could, in time, be a fit parent. But certainly not all (or even most) non-offending parents in this situation are unfit. Under the constitutional principles of due process, the adjudicative process must not be designed or interpreted, in effect, to presume unfitness by a non-offending parent. Due process demands an adjudication on fitness before the state can assume custody in the face of a ready and willing non-offending parent.

C. Many States Recognize the Necessity of Finding Unfitness Before They Can Proceed Against a Non-Offending Parent

Many states recognize that there must first be a finding that a parent is unfit before a court can take custody over a child and order that the parent satisfy various requirements to regain custody. Some states have protected this right by statute; others have done so through the common law. Below is a brief survey of how several states safeguard this fundamental right of both the child and the parent.[2]

1. Arizona

Arizona protects the rights of non-offending parents in dependency proceedings by statute. By definition, a dependent child is a child "[i]n need of proper and effective parental care and control and who has no parent or guardian, or one who has no parent or guardian willing to exercise or capable of exercising such care and control." Ariz Rev Stat Ann § 8-201(13)(a)(i). In *Meryl R v Arizona Dep't of Econ Sec*, the Court of Appeals of Arizona held

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[2] For a more extensive review of how various states handle the issue, see Sankaran, Parens Patriae *Run Amuck: The Child Welfare System's Disregard for the Constitutional Rights of Nonoffending Parents*, 82 Temp L Rev 55 (2009) (attached as **Exhibit B**).

that the lack of legal custody is insufficient to amount to dependency under the statute. 196 Ariz 24, 25; 992 P2d 616 (Ariz Ct App, 1999). The court held that a child cannot be adjudicated as dependent when a parent is willing and fit to assume custody. *Id.* at 26.

2. California

California recognizes the constitutional principle that the offenses of one parent are not necessarily indicative of the fitness of the non-offending parent. California courts have held that due process requires a finding of unfitness before parental rights can be infringed. As the California Court of Appeals explained, "A parent's right to care, custody and management of a child is a fundamental liberty interest protected by the federal Constitution that will not be disturbed except in extreme cases where a parent acts in a manner incompatible with parenthood." *In re Marquis D*, 38 Cal App 4th 1813, 1828; 46 Cal Rptr 2d 198 (1999). The court concluded that the decision determining placement was critical to any further custody proceedings: "Should the court fail to place the child with the noncustodial parent, the stage is set for the court to ultimately terminate parental rights." *Id.* at 208.

Likewise, as explained by the court in *In re Gladys L*, "California's dependency system comports with [due process] requirements because, by the time parental rights are terminated at a section 366.26 hearing, the juvenile court must have made prior findings that the parent was unfit." 141 Cal App 4th 845, 848; 46 Cal Rptr 3d 434 (2006). The court held that "[d]ue process therefore prohibit[ed] the termination of [the father's] parental rights" because the state family agency had never alleged that the father was unfit. *Id.* While acknowledging the laudable goal of "rapidly concluding dependency proceedings," the court held that this goal did not trump the father's right to due process. *Id.* at 849.

3. Colorado

The Colorado Children's Code protects the due process rights of parents and children by providing each parent a right to a jury at an adjudicatory hearing of dependency or neglect. Colo Rev Stat § 19-3-202. In *People ex rel AH*, the Colorado Court of Appeals considered the protections provided by the statute and the Constitution when one parent makes a no-fault admission as to dependency and neglect, but the other parent seeks the jury trial provided by statute. 271 P3d 1116 (Colo Ct App, 2011). The court held that, while the admission by the mother allowed the trial court to maintain temporary jurisdiction over the child, the rulings by two juries as to the father that the child was not dependent and neglected required the court to dismiss the petition. *Id.* at 1122–23. The court thus restored custody to the father. *Id.* at 1124.

4. District of Columbia

The District of Columbia neglect statute codifies a parental fitness presumption: it "shall be presumed that it is generally preferable to leave a child in his or her own home." DC Code § 16-2320(a). Further, a court may not place a child with anyone other than a parent without first finding that "the child cannot be protected in the home and there is an available placement likely to be less damaging to the child than the child's own home." DC Code § 16-2320(a)(3)(C). The statute exemplifies the intersecting principles of protecting a parent's rights while simultaneously preserving as paramount the best interests of the child. See *In re SG*, 581 A2d 771, 786 (DC, 1990) (Rogers, CJ, and Ferren, J, concurring) ("[T]he statute . . . incorporate[s] the basic principle underlying the parental preference, namely, that a child's best interests usually will be to be in the custody of his or her natural parent or parents."). The presumption must be applied in favor of a fit parent. See *In re DS*, 52 A3d 887, 902 (DC, 2012) (remanding the case so the trial court could determine "whether the government has established by clear and convincing

evidence either that the father is unfit or that awarding him custody would be detrimental to the best interest of the child).

5. Illinois

Under the Juvenile Court Act, an Illinois court may remove a child from the custody of a parent "*only* when both parents are determined to be unfit, unable, or unwilling to act in a parental capacity." 705 Ill Comp Stat 405/2-27(1)(a) (emphasis added). The Illinois Court of Appeals has held that, under that statute, "a fit parent has a superior right to custody of his or her child under the Act and that right can be superseded only by a showing of good cause or reason to place custody of the child in a third party." *In re MK*, 271 Ill App 3d 820, 829; 649 NE2d 74 (1995). However, the trial court may exercise continued jurisdiction in the best interests of the child to ensure issues are resolved prior to termination of proceedings. *Id.* at 831 (remanding to the lower court to reopen the case to oversee the administration of counseling for the child).

6. Kansas

Kansas courts have recognized that the parental-preference doctrine is a constitutionally protected right. In *In re MML*, the state removed a minor child from the care of her mother after allegations of sexual abuse by her stepfather. 258 Kan 254, 256; 900 P2d 813 (1995). The mother abandoned her interest in custody, but the non-offending, non-custodial father sought full custody of his daughter. *Id.* at 256–60. The trial court granted only visitation rights. *Id.* The Kansas Supreme Court held that the relevant statute was unconstitutional as applied to the father in that case: "absent a showing that the parent is unfit or that there are highly unusual or extraordinary circumstances mandating the State's exercise of its *parens patriae* powers, the rights of the parent must prevail." *Id.* at 268. The court ordered that the child be placed with her father, subject to counseling and monitoring. *Id.* at 270–71.

7. Maryland

In *In re Russell G*, the Court of Special Appeals of Maryland held that "[a] child in the care and custody of a parent or parents is a [child in need of assistance] only if *both* parents are unable or unwilling to give the child proper care and attention." 108 Md App 366, 376–77; 672 A2d 109 (Md Ct Spec App, 1996). The court concluded that "a child who has at least one parent willing and able to provide the child with proper care and attention should not be taken from both parents and be made a ward of the court." *Id.* at 377.

The Maryland legislature amended its juvenile code to reflect the court's holding in *In re Russell G.* See, e.g., *In re Sophie S*, 167 Md App 91, 105; 891 A2d 1125 (Md Ct Spec App, 2006). The code now provides in pertinent part:

> (e) If the allegations in the petition are sustained against only one parent of a child, and there is another parent available who is able and willing to care for the child, the court may not find that the child is a child in need of assistance, but, before dismissing the case, the court may award custody to the other parent. [Md Code Ann 3-819.]

8. Nebraska

In Nebraska, courts have long recognized the principle that between a biological or adoptive parent and a third party, "a fit biological or adoptive parent has a superior right to the custody of the child." *In re Interest of Amber G*, 250 Neb 973, 982; 554 NW2d 142 (1996). Thus,

> [a] court may not properly deprive a biological or adoptive parent of the custody of the minor child unless it is affirmatively shown that such parent is unfit to perform the duties imposed by the relationship or has forfeited that right; neither can a court deprive a parent of the custody of a child merely because the court reasonably believes that some other person could better provide for the child. [*Id.*]

9. Nevada

The Nevada Supreme Court recently examined and rejected the "one parent doctrine":

> [K]eeping the child from the custody of the parent who is not the subject of the dependency proceeding violates the parent's fundamental constitutional rights to parent his child, when the child was not removed from the home because of his conduct, there were no substantiated findings that he had neglected the child, and the petition for neglect was dismissed as to him. [*In re Parental Rights as to AG*, 295 P3d 589, 590 (Nev Sup Ct, 2013).]

The court articulated that basic principles of substantive due process require the state to demonstrate parental unfitness before assuming jurisdiction and custody: "As long as parents adequately care for their children, there is ordinarily 'no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.'" *Id.* at 595 (quoting *Troxel*, *supra* at 68–69). Therefore, the fact that the father had never been adjudicated as abusive or neglectful of his young son meant that the enforcement of a case plan to regain custody violated the father's right to due process. *Id.* at 598.

10. New Hampshire

New Hampshire provides a non-offending, non-custodial parent an opportunity, upon request, to obtain custody. In *In re Bill F*, the court held that "parents who have not been charged with abuse or neglect must be afforded, upon request, a full hearing in the district court regarding their ability to obtain custody." 145 NH 267, 274; 761 A2d 470 (2000). "At that hearing, a parent must be provided the opportunity to present evidence pertaining to his or her ability to provide care for the child," and only a sufficient showing by the state of parental unfitness will justify removal. *Id.*

11. New Mexico

New Mexico courts have recognized the "tension" underlying the goals of the state's Children's Code as it pertains to termination proceedings: the provisions are to be read so as to preserve the family unit when possible, while balancing "the physical, mental and emotional

welfare and needs of the child," with the understanding "that parental rights are among the most basic rights of our society." *New Mexico ex rel Children, Youth & Families Dep't v Benjamin O*, 141 NM 692, 700; 160 P3d 601 (2007) (citations omitted) (internal quotations omitted). In order to deprive a parent of custody, it must be shown by clear and convincing evidence that the parent is unfit or that extraordinary circumstances exist. *Id.* at 701.

12. New York

New York courts have likewise recognized the fundamental due process rights enjoyed by parents in the custody of their children. For example, in *In re Cheryl K*, the state family court reversed a custody decision made where a non-offending mother was not a party to the custody proceedings. 126 Misc 2d 882; 484 NYS2d 476 (NY Fam Ct, 1985). After a finding of sexual abuse was made against the child's father, the state's family agency placed the child in state custody for one year; the mother was not a party to the child abuse proceeding. *Id.* at 882–83. The court held, "Accordingly, petitioner-mother having not been adjudicated an unfit parent has a superior right to care and custody of her child as against third parties including the [state]." *Id.* at 884.

New York courts have also held that the state must hold proceedings against both parents before granting custody of a child to the state. *Alfredo S v Nassau County Dep't of Social Servs*, 172 AD 2d 528; 568 NYS2d 123 (NY App Div, 1991). As the court explained in *Alfredo*, "If the Department believed the petitioner to be an unfit father, it was obligated to make a sufficient showing in this proceeding of extraordinary circumstances, or to commence a neglect proceeding against him." *Id.* at 127; see also *In re Miner*, 32 Misc 3d 1211(A); 932 NYS2d 761 (NY Fam Ct, 2011) (reaffirming the principle that, "[i]n the absence of neglect, surrender, abandonment, unfitness or other like extraordinary circumstances," a parent may not be denied custody).

13. Pennsylvania

Pennsylvania protects the due process rights of parents and children alike. The stated goals of the Pennsylvania Juvenile Act are, in relevant part:

> "(1) To preserve the unity of the family whenever possible or to provide another alternative permanent family when the unity of the family cannot be maintained. . . . (3) To achieve the foregoing purposes in a family environment whenever possible, separating the child from parents only when necessary for his welfare, safety or health or in the interests of public safety." [42 Pa CSA 6301.]

Pennsylvania courts have considered these goals in several decisions. For example, in *In re Justin S*, the Superior Court of Pennsylvania held that a trial court cannot adjudge a child to be dependent on the state if there is a fit non-custodial parent who is ready, willing and able to provide for the child. 375 Pa Super 88, 103; 543 A2d 1192 (1988). The court explained, "The fundamental purpose of proceedings under the Juvenile Act is to preserve the unity of the family. The care and protection of children are to be achieved in a family environment whenever possible." *Id.*

Similarly, in *In re ML*, the Supreme Court of Pennsylvania succinctly reiterated its rejection of a rule akin to Michigan's "one parent doctrine":

> When a court adjudges a child dependent, that court then possesses the authority to place the child in the custody of a relative or a public or private agency. Where a non-custodial parent is available and willing to provide care to the child, such power in the hands of the court is an *unwarranted intrusion into the family*. Only where a child is truly lacking a parent, guardian or legal custodian who can provide adequate care should we allow our courts to exercise such authority. [562 Pa 646, 650; 757 A2d 849 (2000) (emphasis added).]

D. Some Outlier States Recognize the "One Parent Doctrine"

The protection of a parent's due process right to custody is not uniformly protected across all states.

1. Alaska

Alaska courts have recognized that the state's statutory scheme does not adequately address what to do in circumstances when a non-custodial, non-offending parent is fit and available to take custody of a child. In *Peter A v Alaska*, the father argued that the state violated his constitutional rights when his child was adjudicated as a ward of the state solely based on the actions of the child's mother. 146 P3d 991, 993 (Alas, 2006). The court acknowledged that there was a gap in the statutory law regarding circumstances when there is a non-custodial parent who is willing and able to care for the child. *Id.* at 996 n 30. The father argued that the statute required an "individual assessment" of each parent, while the state responded that the use of the singular "parent" allowed for an adjudication based solely on one parent's actions. *Id.* The court recognized "that other states have adjudication statutes that are considerably more precise regarding one or both of these issues." *Id.* However, because the state voluntarily moved to dismiss the case and the appellate court vacated the adjudication, the appellate court ultimately did not address the constitutional issue. *Id.*

2. Ohio

Ohio currently permits trial courts to bypass an adjudication on whether a non-offending parent is a fit parent and to take custody of a child based solely on a finding that one parent is unfit. In *In re CR*, the Ohio Supreme Court held that there is no separate duty of a trial court to find a non-custodial parent unfit before awarding legal custody to a non-parent. 108 Ohio St 3d 369, 374; 843 NE2d 1188 (2006). Previously, in *In re Hockstok*, the Court had held that a trial court must determine parental unsuitability on the record before granting custody to a nonparent in the context of private custody disputes. 98 Ohio St 3d 238; 781 NE2d 971 (2002). Distinguishing the *Hockstok* and its progeny, the court held that abuse, neglect, or dependency proceedings "implicitly involve a determination of the unsuitability of the child's parents." *In re*

CR, supra at 374; see also *In re MD*, No CA2006-09-223, 2007 WL 2584831, at *3 (Ohio Ct App, Sept 10, 2007) (attached as **Exhibit C**) ("[S]uch an adjudication [of abuse, neglect, or dependency] implicitly involves a determination of parental unsuitability.").

Justice Pfeifer, writing in dissent, criticized the majority's failure to address the constitutional impediment to implicitly finding a parent unfit, as well as the majority's dismissal of *Hockstok*:

> These constitutional rights [to due process] exist whether a child has been adjudicated neglected (as in the case before us) or whether the case involves a parentage action (as in *Hockstok*). Despite the plain and obvious language of *Hockstok*, the majority opinion doesn't even acknowledge that [the father] has constitutional custodial rights. [*In re CR, supra* at 375 (Pfeifer, J, dissenting).]

The line of reasoning that the majority adhered to in *In re CR*—teasing an implicit finding of unfitness of one parent based on the actual unfitness of another—does not survive constitutional scrutiny. As the U.S. Supreme Court recognized in *Stanley*, the liberty interests at issue are too fundamental to be decided by judicial short-cut: "Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, . . . it needlessly risks running roughshod over the important interests of both parent and child." *Stanley, supra* at 656–57.[3]

E. Fathers Have a Positive Impact on Their Children

As the Supreme Court stated in *Troxel*, "there is a presumption that fit parents act in the best interests of their children." *Troxel, supra* at 68. (O'Connor, J) (plurality opinion). Here, it is crucial to note the role fathers in particular can play in furthering the best interests of their

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[3] See also *JP v Dep't of Children & Families*, 855 So 2d 175 (Fla Dist Ct App 2003) (granting physical placement to the non-offending parent but conditioning legal custody on the completion of court ordered conditions); *In re NH*, 135 Vt 230; 373 A2d 851 (1977) (finding adjudication of the child as without parental care and control proper, but granting custody to the fit, non-offending father subject to terms and conditions).

children. Recent scholarship suggests that a father who is active in his child's life increases "physical and mental health, self-esteem, responsible sexuality, emotional maturity and financial security for children." Sankaran, *Advocating for the Constitutional Rights of Nonresident Fathers*, 27 Child L Prac 129 (2008) (citing Horn & Sylvester, Father Facts: Fifth Edition (2007)) (attached as **Exhibit D**). In contrast, children who grow up without fathers "tend to experience high rates of poverty at an earlier age, and are more likely to have problems in school and/or become involved with the criminal justice system." *Id.* (citing National Child Welfare Resource Center for Family-Centered Practice, *Father Involvement in Child Welfare: Estrangement and Reconciliation*, Best Practice/Next Practice: Family Centered Child Welfare (2002)). These studies reaffirm the fundamental principle: that the interests of a child align with the interests of a fit parent, and that a fit parent's rights must be protected.

F. *In re CR* Is Inapposite and this Court Should Reject the "One Parent Doctrine" for the Reasons Stated in Judge Whitbeck's Dissenting Opinion in *In re Irwin*

The facts of this case are materially different than those in *In re CR*, 250 Mich App 185; 646 NW2d 506 (2001). The court's analysis in *CR* focused on whether "it was fundamentally unfair to use evidence concerning [the father] gathered from other hearings when he was not a respondent because he was unaware of these allegations." *Id.* at 208. The court noted that the father had advance notice of all of the hearings and had participated in several of them, and, therefore, "he was given the notice to which he claims he was entitled." *Id.* at 209. On this basis, the court found no due process violation. *Id.*

By contrast, here, the central concern is not with the level of notice given but rather the process denied—i.e., the complete lack of a hearing to determine whether Mr. Laird was an unfit parent before the trial court took jurisdiction over his children. The court in *CR* held that the Michigan Court Rules do not require the trial court to hold an adjudication hearing before

stripping a non-offending parent of custody, see *id.* at 205, but it did not take the next step and find that this lack of a hearing itself does or does not comport with constitutional due process. Recently, the Michigan Supreme Court refused to address the issue due to a failure by the respondent to properly raise the issue on appeal. See *In re Mays*, 490 Mich 993, 994; 807 NW2d 307 (2012). Here, the constitutional issue is now squarely before the Court for a decisive determination.

Although no prior Michigan court appears to have addressed the constitutionality of the "one parent doctrine," Judge Whitbeck of the Court of Appeals raised the issue in an unpublished concurring opinion. In *In re Irwin*, the non-custodial father was a prisoner when his parental rights were terminated. No 229012, 2001 WL 793883, at *1 (Mich Ct App, July 13, 2001). The father raised several concerns with the termination process, all of which were rejected by the Court of Appeals majority. *Id.* at *1–3. Judge Whitbeck concurred separately, and in so doing, addressed what he called "the one parent problem"—the situation where the state family agency lists only one parent as a respondent in a child protection action, thereby depriving the other parent of the right to an adjudication hearing. The unique circumstances of the case (including the fact that the father was incarcerated at the time that he later claimed that he could provide support for his children) and the fact that the father did not challenge the agency's failure to list him initially as a respondent, led Judge Whitbeck to concur for lack of "error requiring reversal." *Id.* at *4. However, he took the opportunity to articulate his criticism of the "one parent doctrine" and how he would rule if properly presented with the issue:

> From my perspective, the [state family agency] *should* list both parents as respondents in a protective proceeding if all the following conditions exist: (1) the [agency] knows both parents' identities, (2) the [agency] knows both parents' whereabouts, (3) there are grounds to list both parents as a respondent in a protective proceeding, and (4) the [agency] intends to initiate protective proceedings against at least one parent. If the [agency] does not make both

parents respondents under these circumstances, which I refer to as the one parent problem, a number of difficult issues may affect the course of the proceedings and the nonparty parent's substantive legal rights.

First, when the one parent problem exists, the [agency] usurps the right of the parent who is not listed as a respondent to demand a jury for the adjudication. I think it possible that if the [agency] worker and legal staff handling a case are particularly pressed for time because of a heavy caseload, they might see a jury trial for the adjudication as a waste of time. In such an instance, the [agency] worker and legal staff could make a calculated guess concerning which parent was less likely to demand a jury trial, proceed only against that parent, and then later add allegations to the petition concerning the other parent who had, for instance, voiced an intent to demand a jury, simply in order to preclude one parent from demanding a jury trial. While this tactic may not violate any specific statute or court rule governing child protective proceedings, it nevertheless lacks the fundamental fairness that is the hallmark of the American justice system. Though I have every reason to believe that most, if not all, [agency] workers who initiate child protective proceedings are efficient, compassionate, and fair advocates for children, I would hate to see child protective proceedings become yet another avenue for legal gamesmanship.

* * *

Some might contend that it is not necessary to emphasize the rights of both parents when the parent who is made a respondent from the start is able to demand the procedures, whether a jury trial for the adjudication or an interlocutory appeal of the family court's order taking jurisdiction. However, all too frequently parents are adversaries, not allies. They may be divorced, never married, or simply not concerned about each other. Further, they often have different attorneys with different legal strategies calculated to protect their individual interests regardless of the other parent's interests. In some instances the parent originally made a respondent in the proceeding dies or abandons his or her parental rights. Thus, it is impractical to believe that a nonparty father can rely on the respondent mother to demand the procedure that would benefit the father, or vice versa.

Others might argue that this concern for *parental* rights in a *child* protective proceeding is unwarranted. I wholly agree the primary focus of a child protective proceeding is the health, safety, and well-being of children. Nevertheless, when a court terminates parental rights, it not only has a significant effect on the children's lives, it is also a drastic step that forever affects the parents' liberty interest in raising their children, an interest that the Constitution protects in no uncertain terms. While the juvenile code and the court rules may technically allow termination of parental rights without certain procedures, the right to due process may nevertheless impose additional safeguards to ensure the fundamental fairness of the proceedings.

> It is important to remember that even children benefit from proceedings that are fair to parents. Fairness inspires confidence in difficult decisions, like the decision to terminate parental rights. After all, while the cases appealed in which termination of parental rights is legally questionable are few and far between, courts do no good by depriving parents of the opportunity to demonstrate their fitness. Fairness also promotes finality. If a family court terminates parental rights following fair proceedings, it is far less likely that a child's life will once again be thrown into chaos by reversal on appeal for a due process violation or other error.
>
> Though I am satisfied with the fairness of the proceedings in this case, I remain convinced that courts must not be so distracted by well-intentioned and perfectly justified efforts to protect children that they ignore how they treat parents. [*Id.* at *3, 5 (footnotes omitted).]

The risk of a deprivation of due process Judge Whitbeck identified in his *Irwin* dissent has been actualized in this case and many preceding ones.[4] Parents have had custody of their children taken from them based on no-contest pleas of ex-spouses and requirements imposed on them without any prior judicial finding that they were somehow unfit. See, e.g., *In re C.R.*, *supra.* This Court should seize this opportunity to conclusively reject the "one parent doctrine" and put Michigan's family court adjudicative process on firm constitutional footing.

IV. CONCLUSION

As the United States Supreme Court explained, the right "to raise one's children ha[s] been deemed essential, [a] basic civil right[] of man, and [a] right[] far more precious than property rights." *Stanley, supra* at 651 (citations omitted) (internal quotation marks omitted) (ellipsis omitted). This latter point is especially poignant here. Had Mr. Laird, through no fault of his own, been stripped of a piece of real property by the state or had his property over-

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[4] In an unpublished decision, *In re Mays (Mays II),* the Court of Appeals wrongly determined that the "one parent doctrine" was constitutional, relying on an unsupported reading of the statutes and court rules relating to dispositional hearings (post-adjudication) that an unfitness finding is inherently made at this later stage of the proceedings. *In re Mays,* No. 309577, 2010 Mich App LEXIS 2461 (Mich App Dec 6, 2012) (attached as **Exhibit E**).

burdened by regulations, he would have been entitled to a hearing and, potentially, just compensation. *Mathews, supra* at 333. His rights in property simply cannot be more deserving of heightened due process protection than his fundamental rights as a parent. "The right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." *Id.* (internal quotation marks omitted).

Yet, Mr. Laird and the Sanders children were stripped of their rights to have Mr. Laird adjudicated as unfit before being treated as such. In setting aside Mr. Laird's interests without first deciding whether those interests *could be* set aside, the trial court violated the constitutional right of due process. For these reasons, *amicus curiae* NACC respectfully requests that the Court hold that the "one parent doctrine" is unconstitutional and remand the matter to the trial court for further proceedings consistent with such holding.

Respectfully submitted,

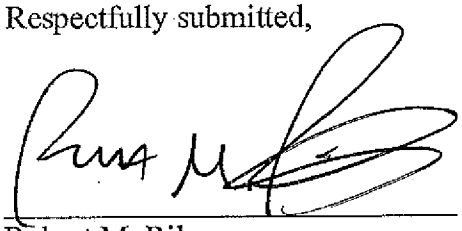

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EXHIBIT A

Not Reported in N.W.2d, 2001 WL 793883 (Mich.App.)
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Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

In the Matter of Kattie IRWIN, Dawson Irwin and Shyanne Lynn Renee Schoolcraft, Minors.

FAMILY INDEPENDENCE AGENCY, Petitioner-Appellee,

v.

Ronald IRWIN, Respondent-Appellant,

and

Sharica SCHOOLCRAFT, Respondent.

No. 229012.

July 13, 2001.

Before: HOOD, P.J., and WHITBECK and METER, JJ.

PER CURIAM.

*1 Respondent-appellant ("respondent") appeals by right from the family court's order terminating his parental rights to three minor children under M.C.L. § 712A.19b(3)(g) ("[t]he parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age") and M.C.L. § 712A.19b(3)(h) ("[t]he parent is imprisoned for such a period that the child will be deprived of a normal home for a period exceeding 2 years, and the parent has not provided for the child's proper care and custody, and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age").[FN1] We affirm.

FN1. At one point in his appellate brief, respondent appears to contend that the family court relied on an outdated version of M.C.L. § 712A.19a(e) and (f) in terminating his parental rights. The family court did not in fact cite these provisions, which were superseded by new language in 1988, in ruling on the termination proceedings.

Respondent first argues that the family court did not have subject-matter jurisdiction in this case and that the order terminating his parental rights must be reversed because although respondent was incarcerated, he was willing and able to care for the children by placing them with their paternal grandparents. We review jurisdictional questions de novo. *Jackson Community College v. Dep't of Treasury,* 241 Mich.App 673, 678; 621 NW2d 707 (2000).

We disagree that reversal based on a lack of jurisdiction is warranted here. Indeed, the family court properly acquired subject-matter jurisdiction over this case based on the neglectful conduct of the children's mother, and respondent did not argue below, nor does he argue on appeal, that the court erred in this finding. Accordingly, respondent's argument regarding the lack of subject-matter jurisdiction is without merit. See, e.g., *In re Gillespie,* 197 Mich.App 440, 442; 496 NW2d 309 (1992) (indicating that the "subject matter" in child protective proceedings is "the child"), and *In re Mayfield,* 198 Mich.App 226, 234-235; 497 NW2d 578 (1993) (indicating, in an appeal from an order terminating the parental rights of the father, that the family court acquired subject-matter jurisdiction over the child because of the mother's neglect). See also *In re Hatcher,* 443 Mich. 426, 444; 505 NW2d 834 (1993), and *In re Powers,* 208 Mich.App 582, 587-588; 528 NW2d 799 (1995) (indicating that the assumption of jurisdiction over a child cannot be collaterally attacked during an appeal from an order terminating parental rights).[FN2]

FN2. To the extent that respondent cites *In re Ferris,* 151 Mich.App 736; 391 NW2d

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468 (1986), for a holding contrary to *Hatcher* and *Powers*, we note that *Ferris* relied on *Fritts v. Krugh*, 354 Mich. 97; 92 NW2d 604 (1958), which was explicitly overruled by *Hatcher, supra* at 444.

Moreover, respondent is incorrect in arguing that the family court could not have properly assumed jurisdiction because of the existence of other relatives who could care for the children while respondent remained incarcerated. First, we note that the holding of *In the Matter of Taurus F*, 415 Mich. 512, 535-537; 330 NW2d 33 (1982), on which respondent relies in arguing that placing a child with a suitable relative constitutes proper care and custody, was the product of an equally divided Supreme Court and therefore does not constitute binding precedent. See *People v. Armstrong*, 207 Mich.App 211, 215; 523 NW2d 878 (1994). In addition, the evidence is clear that respondent had not prevented the children from living in an unfit home at the time the court took jurisdiction. See *In re Systma*, 197 Mich.App 453, 456-457; 495 NW2d 804 (1992). No error occurred in this case with regard to jurisdiction.[FN3]

FN3. Respondent's brief at times seems to confuse subject-matter jurisdiction with personal jurisdiction. To the extent respondent is contending that the family court failed to acquire personal jurisdiction over him, this contention is without merit. Indeed, respondent does not even argue that he was not notified of or did not attend the proceedings in this case. See, e.g., *In re Gillespie, supra* at 442-443 (discussing personal jurisdiction in child protective proceedings). Moreover, respondent failed to cite any authority pertaining to personal jurisdiction and has therefore waived the issue for appeal. See *Great Lakes Division of Nat'l Steel Corp v City of Ecorse*, 227 Mich.App 379, 422; 576 NW2d 667 (1998)

*2 Next, respondent contends that the trial court improperly terminated his parental rights because the paternal grandparents were willing to care for the children and respondent therefore could give the children a proper home. We review for clear error a family court's finding that a statutory basis for termination has been met. MCR 5.974(I); *In re Trejo Minors*, 462 Mich. 341, 356-357; 612 NW2d 407 (2000). Once a statutory basis has been proven by clear and convincing evidence, the court must terminate parental rights unless the court finds that termination is clearly not in the best interests of the child. *Trejo*, supra at 344, 355. A court's finding on the best interests prong is also reviewed by this Court for clear error. *Id.* at 356-357, 365.

We disagree that the family court erred by terminating respondent's parental rights despite the possibility of placing the children with the paternal grandparents. Indeed, a family court is not required to place a child in the care of relatives. *In re McIntyre*, 192 Mich.App 47, 52; 480 NW2d 293 (1991). In *In re IEM*, 233 Mich.App 438, 451; 592 NW2d 751 (1999), for example, the respondent argued that because her mother and grandmother could adequately care for the child, there was no basis on which to terminate her parental rights. The court disagreed, stating "[i]f it is in the best interests of the child, the ... court may properly terminate parental rights instead of placing the child with relatives." *Id.* at 453.

In *In re SD*, 236 Mich.App 240, 247; 599 NW2d 772 (1999), the respondent argued that there was insufficient evidence to terminate his parental rights under M.C.L. § 712A.19b(3)(h) because even though he was incarcerated, the children would be able to reside in a normal home with their mother in the meantime. This Court disagreed, stating that "[e]ven if respondent is paroled in less than four years," there was little likelihood that the children would end up with a normal home, given the respondent's sexual abuse of the children. *Id.* Here, even though respondent was imprisoned for the sexual abuse of a minor other than his own child, he nonetheless posed a risk to his own children, given

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his documented diagnoses of pedophilia, alcohol abuse, and anti-social personality disorder.[FN4] Accordingly, the reasoning of *SD* provides support for the trial court's decision in this case.

> FN4. While the court refused to terminate respondent's parental rights *solely* on his diagnoses and the corresponding possibility that the children would be harmed by respondent if returned to his care, the court, by adopting petitioner's closing statement with regard to the best interests prong of the analysis in this case, nonetheless acknowledged that respondent's diagnoses would likely make his home an unfit place for children (petitioner's statement emphasized respondent's diagnoses).

Moreover, we note once again that respondent did not prevent his children from being in an abusive situation while he was imprisoned. This fact also supported the trial court's decision to terminate respondent's parental rights. See, generally, *Systma, supra* at 457. For purposes of termination, it does not matter whether respondent's failure to prevent the abuse was intentional or unintentional. MCL 712A.19b(3)(h). We additionally note that respondent acknowledged at the termination hearing that he was unlikely to gain custody of his children because of his background and his lack of personal contact with the children resulting from his prison term. Accordingly, respondent essentially contended that the children would remain with his parents indefinitely. This fact also provided support for the trial court's decision. See, generally, *In re Ernst,* 130 Mich.App 657, 663; 344 NW2d 39 (1983). Indeed, the court acknowledged that the children, especially given their ages, needed permanency in their lives. See *McIntyre, supra* at 52.

*3 Finally, we emphasize that respondent has been imprisoned since 1993 and is likely to remain imprisoned for several more years. One of the children was four-and-one-half years old at the time the incarceration commenced and was seven at the time of the termination hearing. The other two children had not even been conceived at the time of respondent's incarceration.[FN5] These facts demonstrate that there was essentially no bonding between respondent and the children.

> FN5. Respondent, without objection, was treated as the father of these two children during the instant proceedings because he was married to their mother when they were born.

In light of the foregoing facts and case law, we simply cannot say that the family court *clearly erred* in determining that a statutory basis for termination existed[FN6] and that termination was in the best interests of the children.[FN7]

> FN6. We note that only one statutory basis need be established to warrant termination. See *Trejo, supra* at 360.
>
> FN7. Although his argument is not well-developed, respondent appears to make an additional contention in his appellate brief that the children should have been placed with his parents at the commencement of the child protective proceedings in this case. We conclude that respondent waived this argument by failing to formally challenge the children's placement at an earlier stage in the proceedings. Moreover, any error in this regard would not affect our decision that the family court did not clearly err in terminating respondent's parental rights.

Affirmed.

WHITBECK, J. (concurring).

WHITBECK, J.

I concur in the result the majority opinion reaches. Even though Ronald Irwin was not a respondent in the proceedings at the time the family court conducted the adjudication in this case, the family court acknowledged its obligation to ensure that the Family Independence Agency (FIA)

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presented legally admissible evidence to support termination.[FN1] The FIA did provide this legally admissible evidence, which established clear and convincing proof of grounds to terminate Irwin's parental rights under M.C.L. § 712A.19b(3).[FN2] Because termination was not clearly contrary to the children's best interests, the family court properly terminated his parental rights.[FN3] Like the majority, I see no merit to the other issues Irwin raises. I write separately to explain, briefly, one aspect of this case that I find somewhat troubling, though not sufficiently so to warrant reversing the family court's order.

FN1. MCR 5.974(E)(1).

FN2. See *id.*

FN3. MCR 5.974(E)(2).

I. The One Parent Problem

From my perspective, the FIA[FN4] *should* list both parents as respondents in a protective proceeding if all the following conditions exist: (1) the FIA knows both parents' identities, (2) the FIA knows both parents' whereabouts, (3) there are grounds to list both parents as a respondent in a protective proceeding, and (4) the FIA intends to initiate protective proceedings against at least one parent. If the FIA does not make both parents respondents under these circumstances, which I refer to as the one parent problem, a number of difficult issues may affect the course of the proceedings and the nonparty parent's substantive legal rights.

FN4. I focus on the FIA because it is a child protective agency and is involved in the vast majority of cases in which a family court considers a petition to terminate parental rights.

First, when the one parent problem exists, the FIA usurps the right of the parent who is not listed as a respondent to demand a jury for the adjudication.[FN5] I think it possible that if the FIA worker and legal staff handling a case are particularly pressed for time because of a heavy caseload, they might see a jury trial for the adjudication as a waste of time. In such an instance, the FIA worker and legal staff could make a calculated guess concerning which parent was less likely to demand a jury trial, proceed only against that parent, and then later add allegations to the petition concerning the other parent who had, for instance, voiced an intent to demand a jury, simply in order to preclude one parent from demanding a jury trial.[FN6] While this tactic may not violate any specific statute or court rule governing child protective proceedings, it nevertheless lacks the fundamental fairness that is the hallmark of the American justice system. Though I have every reason to believe that most, if not all, FIA workers who initiate child protective proceedings are efficient, compassionate, and fair advocates for children, I would hate to see child protective proceedings become yet another avenue for legal gamesmanship.

FN5. See MCR 5.911.

FN6. See MCR 5.974(A)(3).

*4 Second, when the one parent problem exists, it affects the nonparty parent's ability to challenge the family court's jurisdiction over the children. Michigan law is well-settled in holding that the time to challenge a family court's order assuming jurisdiction over minor children in a protective proceeding is immediately after the family court takes jurisdiction, not after it terminates parental rights.[FN7] However, I think it possible, if not probable, that if the nonparty parent challenged the family court's jurisdiction properly, this Court would dismiss the appeal for lack of standing. After all, from the state of the pleadings in such a case, the appealing parent's parental rights are not at risk and, therefore, it is questionable whether that nonparty parent is aggrieved within the meaning of the court rules.[FN8]

FN7. See *In re Hatcher*, 443 Mich. 426, 444; 505 NW2d 834 (1993).

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FN8. See *Dept' of Consumer & Industry Services v Shah,* 236 Mich.App 381, 385; 600 NW2d 406 (1999) (discussing MCR 7.203(A) and related case law).

Yet, the nonparty parent cannot wait until the FIA makes him or her a respondent by proceeding under MCR 5.974(E) in order to gain standing. The factfinding step in MCR 5.974(E)(1) may be considered roughly equivalent to an adjudication, strictly in the sense that it requires legally admissible evidence. Yet the court rules under this changed circumstance provision in MCR 5.974(E)(1) do not create a natural opportunity to file a direct appeal by providing for two phases of proceedings in the way an adjudication is separate from a disposition; once the factfinding step is complete and there is evidence supporting termination, the family court immediately moves to the best interests consideration.[FN9] Of course, having already terminated the parental rights of the parent originally excluded from the proceedings, an appeal to this Court challenging the family court's subject-matter jurisdiction will likely fail because it is a collateral attack. This leaves no practical opportunity for the parent originally excluded from the petition to challenge the family court's subject-matter jurisdiction.

FN9. It is not clear to me whether, to avoid the collateral attack rule, this Court would conclude that the parent had an obligation to ask the family court to stay the proceedings following the factfinding stage in MCR 5.974(E)(1) to file a direct appeal. See *Hatcher, supra* at 444 ("Our ruling today severs a party's ability to challenge a probate court decision years later in a collateral attack *where a direct appeal was available.*") (emphasis added).

II. Irwin's Circumstances

The record in this case indicates that, from the very early stages of the proceedings, the FIA was aware of several important facts or issues. The FIA knew that Irwin was the presumed father[FN10] of three of the children at issue in this case. The FIA was aware that he was imprisoned and where he was imprisoned. I infer from the FIA's expertise in child protective proceedings and familiarity with the statutory grounds for termination, the FIA knew soon after it located Irwin that there were significant obstacles to his ability to provide proper care and custody for his children because he was incarcerated and would remain incarcerated for some time. Because of Irwin's background and criminal history, as well as his extended absence from the children's lives, I find it highly probable that at some time in the early stages of this case the FIA determined that it would petition to terminate his parental rights. Irwin was even present at hearings and represented by counsel before he was made a party. Nevertheless, the FIA did not make Irwin a respondent in the proceedings before the adjudication. While I acknowledge that the FIA had no duty stemming from statute or court rule to do so, I question why the FIA would wait to make him a respondent. I do not, however, find error requiring reversal in this delay because Irwin does not challenge it.

FN10. See *Serafin v. Serafin,* 401 Mich. 629, 636; 258 NW2d 461 (1977) (children born during marriage are "guarded by the still viable and strong, though rebuttable, presumption of legitimacy").

III. Conclusion

*5 Some might contend that it is not necessary to emphasize the rights of both parents when the parent who is made a respondent from the start is able to demand the procedures, whether a jury trial for the adjudication or an interlocutory appeal of the family court's order taking jurisdiction. However, all too frequently parents are adversaries, not allies. They may be divorced, never married, or simply not concerned about each other. Further, they often have different attorneys with different legal strategies calculated to protect their individual interests regardless of the other parent's interests. In some instances the parent originally made a re-

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spondent in the proceeding dies or abandons his or her parental rights. Thus, it is impractical to believe that a nonparty father can rely on the respondent mother to demand the procedure that would benefit the father, or vice versa.

Others might argue that this concern for *parental* rights in a *child* protective proceeding is unwarranted. I wholly agree the primary focus of a child protective proceeding is the health, safety, and well-being of children. Nevertheless, when a court terminates parental rights, it not only has a significant effect on the children's lives, it is also a drastic step that forever affects the parents' liberty interest in raising their children, an interest that the Constitution protects in no uncertain terms.[FN11] While the juvenile code [FN12] and the court rules [FN13] may technically allow termination of parental rights without certain procedures, the right to due process may nevertheless impose additional safeguards to ensure the fundamental fairness of the proceedings.

FN11. See, generally, *Stanley v. Illinois*, 405 U.S. 645, 651; 92 S Ct 1208; 31 L.Ed.2d 551 (1972).

FN12. MCL 712A.1 *et seq.*

FN13. MCR 5.901 *et seq.*

It is important to remember that even children benefit from proceedings that are fair to parents. Fairness inspires confidence in difficult decisions, like the decision to terminate parental rights. After all, while the cases appealed in which termination of parental rights is legally questionable are few and far between, courts do no good by depriving parents of the opportunity to demonstrate their fitness. Fairness also promotes finality. If a family court terminates parental rights following fair proceedings, it is far less likely that a child's life will once again be thrown into chaos by reversal on appeal for a due process violation or other error.

Though I am satisfied with the fairness of the proceedings in this case, I remain convinced that courts must not be so distracted by well-intentioned and perfectly justified efforts to protect children that they ignore how they treat parents.

Mich.App.,2001.
In re Irwin
Not Reported in N.W.2d, 2001 WL 793883 (Mich.App.)

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EXHIBIT B

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Articles

PARENS PATRIAE RUN AMUCK: THE CHILD WELFARE SYSTEM'S DISREGARD FOR THE CONSTITUTIONAL RIGHTS OF NONOFFENDING PARENTS

Vivek S. Sankaran [a1]

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Over the past hundred years, a consensus has emerged recognizing a parent's ability to raise his or her child as a fundamental, sacrosanct right protected by the Constitution. Federal courts have repeatedly rejected the parens patriae summary mode of decision making that predominated juvenile courts at the turn of the twentieth century and have instead held that juvenile courts must afford basic due process to parents prior to depriving them of custodial rights to their children. This recognition has led to the strengthening of procedural protections for parents accused of child abuse or neglect in civil child protection proceedings.

Yet, despite these advances, juvenile courts continue to disregard the constitutional rights of nonoffending parents, individuals against whom the state has made no allegations. Nearly every state permits juvenile courts to deprive nonoffending parents of rights to their children based solely on findings or admissions of child maltreatment by the other parent. Such actions not only raise many constitutional questions, but also jeopardize children's safety and well-being by increasing the likelihood that they will unnecessarily enter foster care and that their parents will disengage with the process. This Article proposes a policy solution that reflects the correct balance between safeguarding the constitutional rights of the nonoffending parent and preserving the flexibility of juvenile court judges to issue orders ensuring that the child's needs are met.

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*56 I. Introduction

Over the past forty years, significant progress has been made in affording procedural protections to parents accused of child abuse or neglect in civil child protection proceedings. Before a court can take the authority to make decisions from a parent who allegedly maltreated her child, [1] she [2] is entitled to a trial to adjudicate the allegations against her, [3] and in most jurisdictions, is appointed an attorney to represent her if she is indigent. [4] Her attorney is given time to prepare for the hearing and can use traditional litigation tools including discovery and subpoena power to gather relevant information. If the state is seeking to

terminate a parent's legal rights to the child, it must prove its case by clear and convincing evidence. [5] Many, if not all, of these changes were precipitated by landmark Supreme Court decisions recognizing that child protection cases impose a "'unique kind of deprivation'" on families that necessitate enhanced due process safeguards not typically available to litigants in civil cases. [6] Though *57 far from perfect, much progress has been made during this time to protect the civil liberties of the alleged offending parent. [7]

Yet, despite these advances, child welfare systems continue to disregard the constitutional rights of nonoffending parents, individuals against whom the state has made no allegations and who thus have done nothing wrong other than to have a child in common with a parent who allegedly abused or neglected the child. These parents are presumed to be unfit based simply on their association with the other parent. Nearly every state permits juvenile courts to deprive nonoffending parents of custodial rights to their children based solely on findings or admissions of child maltreatment by the other parent. [8] Courts are empowered to do this even if the nonoffending parent is ready and willing to assume full responsibility for the child immediately. In a number of these states, courts even have the power to place the child in foster care, without any evidence indicating that the nonoffending parent is unfit, based solely on their subjective determination that such a placement would further the child's best interests. [9] In others, although the nonoffending parent is allowed to assume physical custody of the child, the legal authority to make decisions concerning the child rests in the hands of the juvenile court judge, who also has the power to compel the nonoffending parent to comply with services, such as attending a parenting class. [10] Only in a few states do nonoffending parents retain their full custodial rights until evidence of unfitness is introduced. [11] The justification for this near-universal approach is clear: "[D]ependency law is based on the protection of the children rather than the punishment of the parent. It follows that a finding *58 against one parent is a finding against both in terms of the child being adjudged a dependent." [12]

Yet this reasoning, which consistently appears in cases across the country in which the rights of nonoffending parents have been raised, contravenes Supreme Court case law holding that parents with established relationships with their children have a right to direct the upbringing of their child protected by the Fourteenth Amendment, [13] a right which cannot be interfered with absent proof of parental unfitness. [14] This precedent, however, has not influenced the jurisprudence surrounding nonoffending parents. Juvenile courts throughout the country continue to disregard the rights of nonoffending parents and maintain systems in which judges routinely substitute their judgment of what a child needs for what the child's presumptively fit parent believes is best for the child.

Despite the importance of this issue, it has only received minimal attention from academics and policymakers. No one has proposed a comprehensive law and policy solution which balances the rights of the nonoffending parent, the child, and the parent found to be abusive or neglectful. [15] This Article describes *59 the historical origins of this practice and its conflict with current constitutional doctrine, and suggests a balanced policy response.

This Article will argue that the child welfare system's disregard for the rights of nonoffending parents, a vestige of antiquated procedures previously prevalent in child protective cases, violates the constitutional guarantees in the Fourteenth Amendment. The practice also affirmatively harms children by encouraging courts to make decisions based on unreliable information, by holding children in foster care unnecessarily, and by disempowering fit parents. Part II will briefly discuss the parens patriae mindset, prevalent during the time that specialized juvenile courts emerged, that laid the foundation for the current practice of disregarding the nonoffending parent's rights. This mindset, which transformed the state into the guardian of all children, permitted the summary transfer of custodial rights from parents to the state based on general assertions regarding the child's condition, as opposed to specific findings of each parent's unfitness. Part III will detail the Supreme Court's rejection of this approach and the Court's recognition of constitutionally protected parental rights. It will be argued that these rights extend to nonoffending parents and preclude states from restricting that parent's legal and physical custodial rights absent evidence of parental unfitness. Part IV will assert that, in contravention of these holdings, states have continued to deprive nonoffending parents of custodial rights to their children without any evidence of parental unfitness. Finally, Part V will argue that a system

that preserves all custodial rights with the fit, nonoffending parent, while giving courts the flexibility to address the needs of the offending parent and the child, best serves the interests of children.

II. Parens Patriae Decision Making

The foundation for the current practice of depriving nonoffending parents of legal and physical custodial rights to their children was established at the turn of the twentieth century, when the parens patriae mindset emerged as the dominant rationale behind state intervention to protect children. [16] Prior to this time period, parental rights were afforded much deference, frequently to the detriment of children, and the legal authority for state intervention was extremely limited. Parents had near-absolute power over their children, and, often, child abuse and neglect were ignored by the state. As described by one scholar, "[t]he family's autonomy to do essentially as it saw fit with its children was untouched." [17]

*60 That view, shielding families from government scrutiny, quickly changed as reformers embraced a more intrusive attitude towards protecting children from the corrupting influences of their parents and society. Driven by the doctrine of preventive penology, child advocates--primarily middle and upper class white women--believed that "society should identify the conditions of childhood which lead to crime," such as poverty and child abuse and neglect, and should enact legislation to commit children found in these conditions for their protection. [18] This goal necessitated a significant broadening of the state's authority to intervene in what were previously regarded as private family matters.

The enhanced scope of state authority was justified by a theory that the state was acting pursuant to its parens patriae powers, literally translated as "ultimate parent or parent of the country." [19] In this role, the state recast itself as the ultimate guardian of all children with the mandate to determine which children needed to be protected and how best to accomplish that goal. [20] The state's authority superseded the rights of any individual to the child, including his or her parents, [21] and all state intervention was characterized as taken to protect *61 the child, not to punish the parent. [22] Armed with this new conception of the state's role, reformers pushed for the creation of specialized juvenile courts, the first of which appeared in Illinois in 1899. [23] Immediately thereafter, other states followed. By 1904, ten states had established such courts. [24] By 1920, all but three had. [25] The public broadly accepted the emergence of these courts, and a consensus emerged supporting the state's newfound role as the protector of all children.

In the newly created specialized courts, juvenile court judges became the state's designee to exercise its parens patriae authority, and procedures were implemented to expedite the transfer of custody from parents to the state. Broad, subjective legal standards were adopted, allowing the judge vast amounts of discretion to determine in which cases to intervene. [26] For example, one common statute permitted the court to assume custody of a child if the child was "without proper parental care or guardianship," while another ground rested on whether the child lived "in surroundings dangerous to morals, health, or general welfare." [27] Courts often relied upon very general findings to base their decisions on whether a child was neglected. [28] Not surprisingly, a study of the first juvenile court in Chicago found that "only 6.0% of the 10,631 petitions filed were dismissed, while in 88.5% of the cases a finding of neglect was made." [29] As aptly summarized by a prominent scholar during that era, "In the case of the juvenile court, except in general terms, there is very little substantive law. To do something constructive for the child is the goal of the entire procedure." [30]

Minimal procedural protections for parents complimented the broad legal standards for intervention. [31] Hearings were kept informal [32] and summary, [33] the *62 rules of evidence were relaxed, [34] and the appearance of lawyers was strongly discouraged. [35] Since all parties were purportedly working towards a common goal--the best interests of the child--the proponents of this system rationalized that adversarial procedures were not only unnecessary but were counterproductive. [36]

Often, decisions on the future custody of a child were determined summarily at the first court hearing, without giving the parents an opportunity to prepare or to seek counsel.[37] In these juvenile courts, neither the law nor strict procedural formalities were permitted to prevent the judge from making a decision which he deemed best for an individual child.[38] "[T]hat the hearing has been legally conducted and no law violated is no excuse if the child is finally lost."[39]

*63 With a broad mandate to intervene and relaxed procedures that ensured that he would not be encumbered with needless formalities, in each case, the juvenile court judge quickly assumed the role of the child's parent. Rather than focus on whether each of the child's parents was unfit or which of the two maltreated her, the judge simply sought to determine whether the general condition of the child warranted a need for the court to intervene.[40] So long as the child was maltreated in some way by someone, the court could apply its dispositional powers to order the remedy that it deemed was in the child's best interest. In other words, if one parent committed an offense against the child, the court could obtain custodial authority over the child regardless of the fitness of the other parent.[41] Again, since each parent's rights were deemed subservient to the court's parens patriae authority, the court's sole concern was the condition of the child, not the responsibility of the individual parent for the abuse or neglect.[42]

A number of published cases in this period demonstrate these principles in practice. Take, for example, the case of Bleier v. Crouse,[43] an Ohio case decided in 1920 in which three children were committed to a children's home despite the trial court's failure to provide notice of the proceedings to the children's father.[44] On appeal, the county court of appeals affirmed the trial court's decision finding that the father misconstrued the nature of juvenile court proceedings.[45] The court found that "[t]here [was] no authority to support the contention that notice to the parent [was] a condition prerequisite to jurisdiction of the juvenile court over the child."[46] The court held that "[a]n examination of the juvenile law as a whole leads us to the conclusion that the jurisdiction of the court attaches to the child without regard to the citation of the parent."[47] Although the court acknowledged the father's right to challenge the placement of the children at a later time, "[i]n the interest of the child and in the interest of society the court can commit its custody to strangers, or to an institution for its moral training and education"[48] without notifying the child's parents. Any rights held by each parent to the child were subordinate to the court's parens patriae authority.[49]

*64 Similarly, in Allen v. Williams,[50] the Supreme Court of Idaho upheld a trial court's decision to remove a child from her mother's custody despite failing to serve a petition on her, give her any notice, or provide her with an opportunity to be heard.[51] The Idaho Supreme Court dismissed the mother's argument that procedural due process required that her constitutional rights be determined prior to the juvenile court assuming temporary custody over her child.[52] Instead, the court reasoned:

> Our statute was enacted as a matter of protection to the child and for the welfare of the state. The Legislature, in enacting this law, no doubt saw the wisdom of prompt commitment of a child, who is upon the high road to becoming a moral degenerate and perhaps a future charge upon and a disgrace to the state. To drag such a case through a lengthy and formal criminal or civil proceeding, without prompt detention and commitment of the child, would in many cases thwart the object of the law.[53]

These two cases typify the approach embodied by the original juvenile courts.[54] In this system, the state's paternalism trumped all other interests. The state, acting upon the assumption that its powers superseded all authority conferred by birth on natural parents, granted itself the immediate right to determine the child's best interests without deference to the parent's wishes. Appeals by parents based on the core concepts underlying due process--notice and a meaningful opportunity to be heard--were largely rejected, which signified that the parent's role in the decision-making process was, at best, marginal.[55] Assertions of a parental right to custody based on fitness were ignored and instead yielded to the state's subjective determination of what was best for

"its" child. The summary transfer of decision-making authority from parents to juvenile court judges in order to "save" children represented the core of the parens patriae approach to child welfare.

III. Emergence of Constitutionally Protected Parental Rights

At nearly the same time as the emergence of specialized juvenile courts, the United States Supreme Court began recognizing a substantive due process right *65 to parent protected by the Fourteenth Amendment. The recognition and expansion of this right, which encompasses decisions by both custodial and noncustodial parents, ultimately led to enhanced procedural protections for offending parents in child welfare cases. This section will briefly outline the development of this right and how it led to the rejection of the parens patriae model of decision making. In the next section, it will be argued that the treatment of nonoffending parents is a lingering remnant of the parens patriae mindset.

A. Recognition of Substantive Due Process Right to Parent

The Court first recognized the existence of a substantive due process right to direct the upbringing of one's child in Meyer v. Nebraska, [56] a case appealing the conviction of a schoolteacher who taught German to young children. [57] The Court, in ruling that the conviction should be overturned, had the opportunity to consider what rights were encompassed by the word "liberty" in the Fourteenth Amendment, which it determined, "[w]ithout doubt," to include the right of the individual to "establish a home and bring up children." [58] Two years later, the Court, in Pierce v. Society of Sisters, [59] again found a substantive due process right for parents "to direct the upbringing and education of children under their control." [60] The Court famously declared that "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." [61] In Prince v. Massachusetts, [62] the Court reaffirmed the vitality of this parental right in the context of a Jehovah's Witness appealing a conviction for violating state child labor laws. [63] Though the Court affirmed the conviction, it elevated the stature of the parental right, describing it as a "sacred private interest[], basic in a democracy." [64] In the years after Meyer, Pierce, and Prince, the parental right has been used to insulate an array of parental decisions from state intervention in areas such as directing a child's religious upbringing, [65] choosing with whom the child should associate, [66] and making medical decisions *66 on behalf of the child. [67] The conception of the state as the primary protector, guardian, and decision maker for the child, as theorized in Plato's Republic, has been soundly rejected. [68]

B. Constitutional Rights of Noncustodial Parents

The changing dynamic of the family structure, primarily the increasing prevalence of children being raised by unmarried and separated parents, forced the Court to confront the question of who--or what type of parent--is entitled to protection under the Fourteenth Amendment. Prior to the 1970s, unwed fathers held no legal rights to their children and states commonly usurped parental decision making upon the death of the child's mother if she was unmarried. [69] The unwed father had no presumptive legal right to make decisions and care for the child. [70] All of this changed in the landmark case of Stanley v. Illinois. [71]

In Stanley, the Court evaluated an Illinois law under which the state automatically placed children of unwed fathers in foster care upon their mother's death. [72] The record revealed that Mr. Stanley had intermittently cared for his children throughout their lives, and upon their mother's death had located friends to care for the children. [73] The State, emphasizing its parens patriae authority, argued that it assumed full responsibility for the child immediately upon the death of the unmarried mother since unwed fathers were presumed to be unsuitable parents. [74] It sought to shift the burden of proving parental fitness onto the noncustodial father, whom it said could establish his ability to care for the child by filing for guardianship or adoption, options any legal stranger to the child could pursue. [75]

The Court rejected the state's argument and held that the Constitution requires, as a matter of due process, that the father have a "hearing on his fitness *67 as a parent before his children were taken from him."[76] The State's interest in efficiency did not permit it to presume all unmarried fathers to be unfit:

> Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.[77]

In other words, the Court made clear that depriving both custodial and noncustodial parents of rights to their child without a judicial determination of their unfitness violated the Constitution.[78]

Decisions after Stanley elaborated on the level of involvement noncustodial parents had to establish in their child's life in order to grasp the bundle of rights the Constitution afforded to parents. A common principle emerged from these cases. "When an unwed father demonstrates a full commitment to the responsibilities of parenthood by 'com[ing] forward to participate in the rearing of his child,' his interest in personal contact with his child acquires substantial protection under the due process clause."[79] Thus, in Lehr v. Robertson,[80] the Court upheld a New York statute that did not require that a father be notified of his child's impending adoption because the father had failed to take meaningful steps towards establishing a parental relationship with his child.[81] The Court reasoned:

> The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a state to listen to his opinion of where the child's best interests lie.[82]

Similarly, in Quilloin v. Walcott,[83] the Court held that a biological parent, who had minimal contact with the child, could not disrupt a child's adoption into a family with whom the child had already been living.[84] In both decisions, the Court prevented parents who had not made efforts to establish a relationship with their child from using the Constitution as a sword to disrupt the child's permanent placement.

*68 Where, however, the parent established such a relationship, the Court has prevented states from infringing upon that intact parent-child bond without providing adequate process. In Caban v. Mohammed,[85] the Court struck down a New York statute that denied a father the right to object to an adoption that the biological mother had already consented to.[86] Although the decision was based on equal protection grounds, the Court's holding centered on the fact that the father was as involved in the children's upbringing as their mother.[87] Although the Court has never prescribed the specific actions a noncustodial parent must take to grasp his constitutionally protected interest in his child, the Court's rulings clarify that the physical and legal custodial rights of parents who have established relationships with their children are constitutionally protected from state interference absent proof of unfitness.

C. Enhanced Procedural Protections in Child Welfare Cases

The Supreme Court's recognition of constitutionally protected parental rights has fueled enhanced procedural protections in child abuse and neglect cases. In Santosky v. Kramer, [88] the Court determined that the state had to prove parental unfitness by clear and convincing evidence prior to terminating parental rights. [89] In Lassiter v. Department of Social Services, [90] the Court held that in some termination proceedings the Constitution mandated the appointment of counsel for parents. [91] In M.L.B. v. S.L.J., [92] the Court concluded that due process required courts to furnish indigent litigants trial court transcripts, free of cost, when appealing termination of parental rights decisions. [93] On numerous occasions, the Court has described the deprivation in child protective cases as a "unique kind of deprivation," [94] implicated by even a temporary dislocation of a child from his or her parent's custody. This deprivation warrants heightened procedural protections not typically applicable in civil proceedings.

State legislatures have responded by affording parents accused of child abuse or neglect an increased panoply of statutory protections to safeguard their fundamental rights. Nearly every state appoints attorneys to represent the alleged offender at the outset of a civil child protective case. [95] The parent is given an opportunity to contest the emergency removal of the child, if it occurs, *69 and has the chance to prepare for a full-blown evidentiary hearing, typically several months after the filing of the petition, to contest the allegations made against her. [96] In most jurisdictions, discovery rights are afforded, strict evidentiary rules apply, and appellate rights exist to remedy incorrect decisions. [97] If the state fails to meet its burden, the case is dismissed. Though many flaws continue to permeate the child protective system, the court system has been revolutionized over the past thirty years to safeguard the rights of the alleged offender, a transformation spurred by the seminal cases noted above, recognizing and reaffirming the sanctity of a parent's right to raise his or her child.

The decisions by the Supreme Court, along with the increased procedural protections in state statutes, evinced the rejection of the parens patriae mode of decision making in child protective cases. The prompt, summary transfer of children from their parents into state custody was repudiated and instead replaced by a process consistent with basic notions of due process--notice, an opportunity to be heard, and a presumption of fitness that must be rebutted by the state at a judicial hearing. Any doubt regarding the rejection of the parens patriae model was resolved in In re Gault, [98] a juvenile delinquency case in which the Court held that children accused of crimes were entitled to receive many of the protections afforded to adult criminal defendants, such as the receipt of notice, appointment of counsel, and the ability to cross-examine and confront witnesses. [99] In doing so, the Court issued a strong pronouncement against the informality so prevalent in juvenile court proceedings justified under the parens patriae rhetoric. The Court described the Latin phrase as "a great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme" [100] but found that "its meaning is murky and its historic credentials are of dubious relevance." [101] The conclusion reached by the Court was clear: "'[T]he admonition to function in a 'parental' relationship is not an invitation to procedural arbitrariness.'" [102]

One studying this line of cases and assessing the resulting changes made in state child protective laws would likely conclude that the transformation of juvenile courts has been completed and that a new structure emphasizing procedural fairness governs decision making. In many ways, particularly with respect to the treatment of parents accused of maltreatment, this may be true. Yet, in one important respect--the treatment of nonoffending parents--the *70 antiquated mindset of a previous era lingers. In most jurisdictions, the state still maintains the right to summarily usurp custodial authority from a parent against whom no allegations of unfitness are made, based solely on the conduct of the other parent. The remainder of this Article discusses the various manifestations of this practice and how it harms children, and, in the final Part, proposes a policy solution that balances the constitutional rights of the nonoffending parent with the interests of the child and the other parent.

IV. The Treatment of Nonoffending Parents

The overwhelming majority of states currently maintain child welfare systems that disregard the constitutional rights of nonoffending parents. Although the manifestations of the deprivation vary, the justification for the different approaches has been

consistent: the state's lingering parens patriae authority warrants it to take an active role in a child's life where there is evidence that one parent has maltreated the child even when the other has done nothing wrong. [103] Appellate decisions scrutinizing these systems have given scant attention to the constitutional rights of the nonoffending parent and have generally endorsed the state's ability to encroach on the nonoffending parent's rights based on its determination that such actions are in the child's best interest. Those few states that have rejected this encroachment have instead adopted an extreme approach that prevents juvenile courts from intervening in any way with respect to either parent or the child where the child has only been maltreated by one parent. In my estimation, the correct balance would permit the court, upon a finding that a child has been harmed by one parent, to assume limited jurisdiction over the case to remedy the effects of the maltreatment by the offending parent, while forbidding it to restrict the custodial rights of the nonoffending parent, except in limited circumstances. The strengths of this balanced approach will be discussed in Part IV.B.

A. No Parental Presumption

States have intruded upon the constitutional rights of nonoffending parents in several ways. A number of states, such as Michigan and Ohio, have adopted policies which permit courts to strip nonoffending parents of all custodial rights to their children immediately upon a finding that the other parent has abused or neglected the child. [104] In these jurisdictions, immediately upon a finding against *71 one parent, the trial court obtains temporary custody of the child and can issue any order it deems to be in the child's best interest. Even without a finding of unfitness against the nonoffending parent, the court can place the child in foster care, [105] compel the nonoffending parent to comply with services, [106] and order that that parent's rights be terminated based on the failure to comply with those services. [107] These systems treat nonoffending parents as legal strangers to the child, and the burden is placed on them to prove to the court that it is in the child's best interest to be placed with them. In these jurisdictions, Supreme Court precedent has had little impact on shaping the jurisprudence involving nonoffending parents.

Take, for example, the Michigan case of In re Church, [108] which involved three children over whom the court assumed jurisdiction based solely on a plea entered by the children's father. [109] The father admitted that he had neglected the children by not financially supporting them and by failing to protect them from their mother's emotional and mental instability. [110] Although the initial petition contained allegations against the mother, the prosecutor withdrew the allegations immediately after the father's plea was accepted. The trial court did not afford the mother a jury trial on the allegations against her, as she had requested. [111] Then, at the dispositional hearing, the court ordered that the three children be placed outside of the mother's custody, compelled the mother to comply with services, and determined that it would decide, at a later date, whether it was in the children's best interests to be returned to her custody. [112] At no point did the trial court find that the mother was unfit.

The Michigan Court of Appeals affirmed the trial court's actions. [113] It stated that upon a finding against one parent, Michigan law permitted the trial court to dispense with holding an adjudicative hearing to substantiate the allegations against the mother and could enter any orders involving her, including those mandating compliance with services that it deemed were in the children's interests. [114] It also concluded that Michigan statutes provided vast *72 discretion for courts to enter orders "placing the children outside of the custodial parent's care whose neglect did not factor into the assumption of jurisdiction over the children" [115] as long as the court was acting "to ensure the children's well-being." [116] Countless numbers of cases in Michigan have similarly treated nonoffending parents as legal strangers to the child. [117]

The Illinois case of In re Y.A. [118] applied similar reasoning. In that case, the trial court obtained jurisdiction over the child after the child's mother admitted that she had created a harmful living environment. [119] No findings of maltreatment were issued against the father, and instead, the trial court explicitly found the father to be a fit parent. [120] Yet, the court still named the Department of Children and Family Services as the guardian of the child, which then determined that placement in foster care was warranted. [121] The Court of Appeals, which affirmed the trial court's decision, justified the decision by observing that,

"[a]lthough it is true that the [father] was fit, the purpose of the dispositional hearing was for the trial court to determine whether it was in the best interests of the child to be made a ward of the court," [122] and thus it could place the child in foster care even after determining that a parent was fit. In other words, even without a finding of unfitness, the parent's constitutional right to custody could be displaced by the court's subjective determination of what was best for the child.

A third case, In re M.D., [123] demonstrates the prevalence of this approach. A child entered foster care after her father was arrested. [124] The trial court subsequently found that the child came under its purview based on the father's conduct, but made no findings against the child's mother. [125] Despite the mother's request for immediate custody, the court placed the child with her paternal *73 grandparents, determining that it was best for the child to live with them. [126] On appeal, the Ohio Court of Appeals upheld the court's actions. The court ruled that a juvenile court "'has no duty to make a separate finding at the dispositional hearing that a noncustodial parent is unsuitable before awarding legal custody of a child to a non-parent relative.'" [127] Instead, an adjudication of abuse or neglect "'is a determination about the care and condition of a child and implicitly involves a determination of the unsuitability of the child's custodial and/or noncustodial parents.'" [128] Thus, based on one parent's conduct, the presumption that the other parent is fit is implicitly extinguished and the burden shifts to that parent to prove his or her adequacy.

These three cases typify the common practice of completely disregarding the nonoffending parent's rights in juvenile courts. Treated as a stranger to the child, the nonoffending parent has no legal rights to the child and instead must convince the state of his or her suitability, a tough burden of persuasion especially in a setting in which parents are routinely viewed with suspicion. These cases only give passing reference to the nonoffending parent's substantive due process right to raise his child and rarely address the Supreme Court's Stanley v. Illinois [129] decision, which seemingly requires juvenile courts to make findings of unfitness prior to interfering with a parent's custodial rights. [130] Despite serious constitutional infirmities, these approaches have survived numerous challenges on appeal.

B. Limited Parental Presumption

A number of other jurisdictions have adopted a more nuanced approach while continuing to deprive nonoffending parents of their full custodial rights. In these courts, judges recognize the parental presumption but only apply the presumption with regards to the physical custody of the child. Absent a finding of unfitness, nonoffending parents are granted physical custody of their children, but the court still retains legal custody, that is, the authority to make decisions regarding the child, and can order the nonoffending parent to comply with services. [131] Though safeguarding the physical custody rights of nonoffending parents, these systems intrude on their legal custody.

*74 Decisions in Florida and California best illustrate this approach. [132] In J.P. v. Department of Children and Families, [133] the trial court found that a child was dependent due to the actions of the mother but determined that evidence of the father's unfitness was insufficient. [134] The court recognized that Florida law imposed a requirement to transfer physical custody of the child to the nonoffending parent upon the completion of the home study, but proceeded to condition that placement on the father submitting to a psychological evaluation and complying with any recommendations made by the evaluator. [135] The father appealed, arguing that since he was found to be a nonoffending parent, the court lacked the authority to order him to participate in services. [136]

The Florida Court of Appeals disagreed. The court interpreted the juvenile code to permit any parent, regardless of his or her responsibility for the child's abuse or neglect, to participate in treatment and services as the court determined was necessary. [137] Specifically, even after the restoration of physical custody to the nonoffending parent, the Florida statute in question permitted the court to order "that services be provided solely to the parent who is assuming physical custody in order to allow that parent

to retain later custody without court jurisdiction, or that services be provided to both parents." [138] Few limits exist to constrain the juvenile court's ability to intrude on the nonoffending parent's decision-making authority. Despite the lack of an unfitness finding, the law presumes that the court is in a better position than the nonoffending parent to make decisions regarding the child's. [139]

*75 California courts approach child welfare cases in the same way. California law mandates that courts must place a child with the nonoffending parent "unless it finds that placement with that parent would be detrimental to the safety, protection, or physical or emotional well-being of the child." [140] Even after the transfer of physical custody, the court may subject that parent to the "supervision of the juvenile court" and may order that the parent comply with services it deems necessary. [141] For example, in Mendocino County Department of Social Services v. Shawn P. (In re Jeffrey P.), [142] the trial court ordered the child to be placed with his nonoffending father after the mother's unsuitability was proven, but then ordered the father to attend parenting classes and to accept the services of a parent aide. [143]

The Court of Appeals affirmed the lower court's decision to compel the nonoffending father to comply with services. [144] It explained that the trial court decided to give the father physical custody of the child while giving the state agency legal custody, a decision that was "within the juvenile court's discretion." [145] In reaching this conclusion, it emphasized that a child protection case was brought "on behalf of the child, not to punish the parents" and any imposition placed on the parent only occurred to further the child's interests. [146] Thus, interfering with a fit parent's legal custody was permissible so long as the interference furthered the court's determination of the child's best interest.

Even in these jurisdictions where courts appear cognizant that parents possess a constitutional right to custody of their child, courts have created an artificial distinction between physical and legal custody, one that has never been recognized by the Supreme Court. These courts interpret the Constitution to only protect the physical custodial rights of fit parents, while permitting the state to intrude upon that parent's legal rights to make decisions for the child. Never has the Supreme Court recognized this distinction, and in fact, the decisions discussed in Part III reflect the Court's strong protection of both physical and legal custodial rights of fit parents. For example, in Stanley, the Court prevented the state from removing children from the physical custody of their father absent proof of unfitness. [147] In Troxel v. Granville, [148] the Court barred courts from second-guessing the decisions made by a presumptively fit parent regarding with whom her child should associate. [149] But despite these and other holdings, in many states, once one parent is found to be unfit, the nonoffending parent is *76 viewed with suspicion and his ability to make sound decisions for the child is afforded no deference. Guilt by association pervades the process. "[A] finding against one parent is a finding against both in terms of the child being adjudged a dependent." [150]

C. No State Involvement

Two states, Maryland and Pennsylvania, have recognized that nonoffending parents have constitutionally protected rights and have adopted an approach completely at odds with those described above. [151] There, if a nonoffending parent exists, the court may not assume jurisdiction over the child for any purpose, even to offer services to the offending parent or the child. [152] The juvenile court must dismiss the case and the only limited action it may take is to grant custody to the nonoffending parent before dismissal. [153] Once the transfer of custody is made, all court involvement or oversight must be terminated. [154]

Two cases illustrate this approach. In In re M.L., [155] a trial court found that a child was dependent because her mother was making repeated, false accusations that the child was being sexually abused by her father, subjecting the child to intrusive medical examinations. [156] While assuming jurisdiction of the child, the court found the father to be a fit parent and immediately

placed the child in his care under the court's supervision. [157] The father appealed, arguing that the court had no basis to maintain any oversight over the case since he was a fit parent. [158]

The Pennsylvania Supreme Court agreed with the father and reversed the trial court's decision to exercise jurisdiction over the child because the child had a fit, nonoffending parent. [159] The court determined that "a child, whose non-custodial parent is ready, willing and able to provide adequate care to the child, cannot be found dependent." [160] If the noncustodial parent is immediately available to care for the child, then the court must grant that parent custody and dismiss the case. [161] The court concluded that any retention of power by the trial court to make decisions regarding the child would be "an unwarranted intrusion *77 into the family," which is only appropriate "where a child is truly lacking a parent." [162]

Maryland's Court of Special Appeals, in In re Russell G., [163] reached a similar conclusion. There, court intervention was requested to protect the child from his alcoholic mother; the child was committed to the Department of Social Services for placement in the care and custody of his father. [164] After the court determined that the allegations against the mother were true, the court declared that the child was dependent and placed him in the physical custody of his father, but subjected that placement to the supervision of the Department of Social Services, a decision which both parents appealed. [165]

The Court of Special Appeals agreed that the court intervention was inappropriate due to the willingness of the nonoffending parent to assume immediate custody of the child. [166] "A child who has at least one parent willing and able to provide the child with proper care and attention should not be taken from both parents and be made a ward of the court." [167] Thus, the court determined that a finding that a child was dependent was erroneous since a nonoffending parent was willing to care for the child. [168] Subsequent to the court's decision, the Maryland State Legislature amended its statute to permit the juvenile court, before dismissing the child protective case, to award the nonoffending parent custody after finding evidence that the child was harmed by the other parent. [169] In Maryland and Pennsylvania, other than making this custody determination, juvenile courts are prohibited from taking any actions regarding the child where a nonoffending parent asserts his right to custody over the child. [170]

V. Shortcomings of Current Approaches

The three approaches described above fail to offer the correct balance between safeguarding the constitutional rights of the nonoffending parent while providing courts with the much-needed flexibility to address the needs of the child and the other parent. The jurisdictions which permit trial courts to deprive nonoffending parents of legal and/or physical custodial rights to their children *78 run afoul of constitutional guarantees that prevent the state from encroaching on these rights without a finding of parental unfitness. [171] These systems are ripe for constitutional challenges.

In addition to their constitutional flaws, the policy of interference with the custodial rights of fit parents is likely to produce bad outcomes for several reasons. First, the stress that foster care systems across the country face is well known, and all efforts to safely reduce the numbers of children in care will only promote their best interests. [172] Yet, in states like Michigan and Ohio, children are unnecessarily placed in overburdened foster care systems despite the willingness and availability of fit parents to care for their children immediately. In these states, courts are permitted to ignore the nonoffending parent and place children in foster care even if that parent is fit. Restoring constitutional rights to nonoffending parents will force courts to seriously consider those parents as placement options unless clear evidence of unfitness exists, thereby reducing the number of children completely dependent on the state. As aptly described by the Washington State Court of Appeals, "A parent cannot be denied his right to parent his child on the off-chance that he may have a problem unknown to the State." [173] This is precisely the approach endorsed by these states.

*79 Second, scarce public funds are wasted by ordering nonoffending parents to comply with services which may or may not be necessary. [174] In most states, nonoffending parents are presumed to be unfit upon a finding against the other parent and are often put through a standard regimen of court-ordered services, typically including parenting classes and psychological evaluations, to test their fitness. [175] Since evidentiary hearings detailing that parent's deficiencies are not legally required, these services are mandated without any evidence of the problem they are trying to solve or the connection between the problem and the underlying abuse or neglect of the child. [176] A system which requires the state to introduce reliable evidence of parental unfitness prior to intruding upon a parent's custodial rights would ensure that the state's response is narrowly tailored to the specific problems facing that parent.

Third, the approach hurts children by disempowering their parents and increasing the likelihood that their parents will disengage from the process. Research reveals that parents who are provided with procedural protections and are given "their day in court" are much more likely to stay involved in the process and comply with court mandates. Repeated studies by social psychologists provide compelling evidence that a key determinant in retaining the support of those involved in court systems is the utilization of fair procedures to make decisions. [177] Trust in the motives of authorities and judgments about the *80 fairness of procedures are strong influences on acceptance and satisfaction of court mandates. [178]

In assessing what is "fair," litigants look to a number of factors. Most importantly, procedures that permit individuals to present arguments and to exert control over the process are deemed just whereas those that silence litigants only exacerbate feelings of mistrust. [179] Central to these findings is a person's need to have his story told, regardless of whether the telling will ultimately impact the outcome of the case. [180] Fairness is also enhanced by adequate representation and confidence that the decision maker is neutral and unbiased. [181] Courts that reaffirm one's self-respect and treat a person politely while respecting one's rights earn the trust of those before it, regardless of the substance of the orders they issue. [182]

Yet, the crux of the approaches adopted in these jurisdictions does exactly the opposite. Nonoffending parents are stripped of presumptions that their children shall be placed in their legal and physical custody and are explicitly denied the right to an evidentiary hearing at which the state must prove parental unfitness. Instead, their unfitness is presumed, services the court believes are necessary are ordered, and the parent has no choice but to simply submit to the court's orders or walk away. [183] These approaches are devoid of any procedural justice, which only exacerbates the likelihood that the parent will become frustrated with the process and perhaps disengage in some way. This disillusion can be avoided by restoring procedural rights to nonoffending parents and requiring constitutionally mandated burdens of proof on the state. Parental engagement will only enhance the quality of child protective proceedings.

Finally, allowing the court to interfere with the custodial rights of both parents based on findings against one raises the possibility of manipulation. A parent, in the context of an acrimonious divorce or custody battle, could make allegations that lead to the filing of a petition. Once the petition is filed, that *81 parent could then admit to findings in the petition, which, in these states, would then allow the court to enter broad orders that encroach upon the physical and/or legal custody rights of both parents. Similarly, the child welfare agency could pursue allegations against one parent for the sole purpose of obtaining authority over the other parent, against whom allegations may be more difficult to prove. [184] As noted by the Colorado Court of Appeals, "To allow an adjudication under such circumstances would permit dependency and neglect proceedings to be used for manipulative purposes . . . to the possible detriment of the best interests of the child." [185] These are but some of the reasons why ignoring the parental presumption of fitness, as it relates to nonoffending parents, will generate poor outcomes for children.

On the other hand, the approach implemented in Maryland and Pennsylvania, while zealously protecting the constitutional rights of nonoffending parents, deprives juvenile courts of the flexibility to craft orders to further the interests of the offending parent and the child. [186] In these states, the juvenile court cannot maintain any oversight over the family; if a nonoffending parent is

able to care for the child, the case must be dismissed. [187] The only remedy available to the court is to grant the nonoffending parent custody of the child prior to dismissal. [188] This type of approach raises several concerns.

First, in many states, specialized services for children are only available to children with open dependency cases. [189] This unfortunate reality exists, in part, due to state budgetary constraints and policy choices and federal child welfare statutes that provide states with funds to offer services to children involved in the foster care system. [190] Thus, often, children not affiliated with the system are deprived of needed services. [191]

*82 Take, for example, a child who was sexually abused by her father and placed immediately with her nonoffending mother. The mother wishes to enroll the child in sex abuse counseling, which if privately retained would be quite costly, but would be paid for by the state if an open dependency case existed. The mother wishes for the case to remain open until the child receives all necessary services, yet the approach adopted by Maryland and Pennsylvania does not permit such a result; the willingness of the nonoffending parent to care for the child mandates the dismissal of the case. The dearth of services outside the child welfare system would likely result in the child's needs going unmet.

Second, this approach deprives offending parents of their statutory right to receive an opportunity to reunify with their children and instead forces judges to make premature decisions contrary to the child's interests. Federal law requires states to make "reasonable efforts" to reunify the family if a child has been removed from the home. [192] In Maryland and Pennsylvania, however, no opportunity for reunification is given. [193] After a child is placed with a nonoffending parent, the court only has two options. It may simply dismiss the case immediately, or it may grant the nonoffending parent custody of the child and then dismiss the case. No other choices exist.

Closing the case without granting the nonoffending parent permanent custody of the child may jeopardize the safety of the child and the nonoffending parent. Once the judge dismisses the case, all of the orders entered in the child protective case would lose their force and nothing would exist to protect the new family unit from the abusive parent. [194] The nonoffending parent would have no legal authority to prevent the other parent from having access to the child, yet in serious cases of child maltreatment, limiting access may be essential. The nonoffending parent's recourse would be to file a separate custody action to obtain such an order, but the time it may take to do so would be prohibitive. [195] *83 In the interim, the child and the nonoffending parent would be subject to a state of impermanence during which the abusive parent would continue to have equal rights to access the child.

Maryland and Pennsylvania have responded to this safety risk by giving courts the authority to grant the nonoffending parent permanent custody of the child prior to closing the child protective case. [196] But this too raises concerns because a child's interests may not be served by granting the nonoffending parent immediate custody prior to giving the other parent an opportunity to reunify with her child after participating in services. [197] Consider the example of the child who has been living with her mother for the past ten years, while visiting her father every other weekend. The child enters the foster care system after her mom lapsed into depression and hit her with a belt while intoxicated. The evidence reveals that this only happened once, and the mother is eager to participate in services. The child also wants to return to her mother's care but is placed temporarily with her nonoffending father, who played no role in the abuse.

Again, in Maryland or Pennsylvania, the juvenile court would have to close the case either immediately upon placing the child with her father or after granting the father long-term custody of the child. [198] But neither of these options seems appropriate. Closing the case immediately may place the child in danger for the reasons described above. Without receiving services, the mother may not be in a position to safely care for the child, but no legal orders would prevent her from having unlimited contact with her daughter or immediately resuming her care for the child.

*84 Granting the father long-term custody may not be warranted either. The mother, who has been the child's custodial parent for the past ten years and still maintains residual rights to the child, is eager to regain custody of her child, is willing to comply with services, and has a child who wants to return to her care. She acknowledges that she made a mistake and desperately seeks to reunify with the child, and placement with her, after she receives services, may be the best outcome. Further, the child's father may not want to assume the role of the permanent custodial parent. Forcing the court to issue a long-term custody order based on one incident would deprive the mother of access to services to better herself and would impose a high burden on her in the future to modify the order.[199] Instead, a much better approach, described below, would be to place the child temporarily with the nonoffending parent, provide services to the offending parent, and permit the court to make a long-term custody decision after the mother has had the opportunity to participate in the services. This option is not available in most jurisdictions.

As described above, the current approaches either fail to protect the rights of the nonoffending parent or deprive courts of the much-needed flexibility to meet the needs of the child and the offending parent. The adoption of a new policy is required which balances all of these interests while surviving constitutional scrutiny. The final Part describes such an approach.

VI. Solution

My proposed solution consists of two guiding principles. First, a juvenile court must be afforded the flexibility to assume jurisdiction over a child based on findings of maltreatment against one parent. This authority is essential to ensuring that the court has the ability to issue orders to remedy the abuse or neglect by the offending parent. Second, in order to respect the constitutional rights of the nonoffending parent, the court's power should be limited. While the case is ongoing, absent proof of parental unfitness, the court must grant custodial rights to the nonoffending parent to the satisfaction of that parent. The only authority the court could exert over the nonoffending parent would be to compel him to cooperate with reunification efforts, since the offending parent maintains residual rights to the child.[200]

*85 This solution would be straightforward to implement in practice. Upon finding that one parent abused or neglected the child, the court could obtain jurisdiction over the child and could use that power to issue orders to remediate the underlying abuse or neglect by the offending parent. This authority could be used to regulate the offending parent's contact with the child, compel her compliance with a case service plan, or even terminate her parental rights in extreme circumstances. Additionally, the court could also order the child welfare agency to provide services to the child and the nonoffending parent necessary to address the maltreatment.

Despite having broad authority over the offending parent, the court's jurisdiction over the nonoffending parent would be limited. As the case proceeded, absent an unfitness finding, the court would have to grant the nonoffending parent custodial rights to that parent's satisfaction. Any attempt to interfere with those rights, unrelated to reunification efforts, would require the filing of a petition against the nonoffending parent, which would then trigger all the procedural protections available under state law. Only after making a specific finding of unfitness against that parent could the court obtain authority over him. Such a finding would trigger the court's ability to remove the child from that parent's custody,[201] order the parent to participate in services, or override his determination of what is best for the child.

As noted above, one exception would apply. Since child protective cases implicate the constitutional rights of both parents, the court would have the authority, even without an unfitness finding, to issue orders to ensure that the nonoffending parent did not undermine the offending parent's ability to reunify with her child. For example, the court could mandate that the nonoffending parent make the child available for visitations with the other parent, institute family therapy, and order that the child be returned to the temporary custody of the offending parent. If the nonoffending parent refused to cooperate with reunification efforts, the court could use its contempt powers to enforce orders.

Under this approach, preserving the custodial rights of the nonoffending parent would not interfere with the opportunity of the other parent to reunify with her child. After giving the offending parent the chance to participate in services, the court would be

well-positioned to make an informed decision about which parent should be the long-term custodian of the child. This approach, permitting the court to address the needs of the child and giving the offending parent the opportunity to reunify with her child, while prohibiting the court from intruding upon the rights of the nonoffending parent, strikes the appropriate balance between flexibility, safety, and adherence to the due process rights of all parents.[202]

*86 Critics of my approach may argue that giving nonoffending parents unfettered discretion with regards to children who have been found to be abused or neglected would jeopardize their well-being. They may assert that the state's interest in these children is heightened due to the maltreatment, and that state social workers are the experts in determining what the child needs. Under this view, social workers, and not the child's parents, should have the broad authority to make decisions for the child.[203]

This argument, however, is unpersuasive. It is important to remember that nonoffending parents, by definition, are those against whom no allegations of unfitness are made. No reason exists to doubt their decision-making abilities and thus the state has no justification to intrude. If such grounds exist, a petition alleging misconduct can be filed, an evidentiary hearing can be convened, and findings can be made against that parent which would then empower the court to issue orders related to that parent. While this process unfolds, the court could also issue emergency orders to protect the child, as it could with regards to any offending parent. But, without specific evidence of unfitness, the state has no interest in interfering with the nonoffending parent's custodial rights to the child.[204]

Additionally, given the states' poor track record in meeting the basic needs of children in foster care[205]--a record that includes federal court oversight of numerous state child welfare systems due to rampant violations of the *87 constitutional rights of foster children[206]-- the argument that the state is the expert on addressing the needs of at-risk children is tenuous. Indeed, as the Supreme Court has observed, "[H]istorically [the law] has recognized that natural bonds of affection lead parents to act in the best interests of their children."[207] No reason exists to deviate from this fundamental principle.

VII. Conclusion

Over the past hundred years, a consensus has developed recognizing a parent's ability to raise his or her child as a fundamental, sacrosanct right protected by the Constitution. Federal courts have repeatedly rejected the parens patriae mode of decision making and have instead held that the Constitution requires the state to introduce proof of parental unfitness prior to the temporary or permanent deprivation of that right from a parent. Yet, juvenile courts have persisted to strip nonoffending parents of those rights without any procedural protections, a striking remnant of the parens patriae mindset. Such actions not only raise many constitutional questions, but also jeopardize the child's safety and well-being by increasing the likelihood that he will unnecessarily enter foster care and that his parents will disengage with the process.

Current approaches to rectify the problem fail to reflect the correct balance between safeguarding the constitutional rights of the nonoffending parent and preserving the flexibility of juvenile court judges to issue orders regarding the offending parent and ensuring that appropriate services are available to the child. This balance can be achieved by implementing a policy which permits the court, upon a finding of abuse or neglect by one parent, to obtain limited jurisdiction in the case to enter orders addressing that parent and to order the child welfare agency to offer services to the child and the nonoffending parent. But, without a finding of unfitness against the other parent, the court would be prohibited from entering any orders that infringe upon the nonoffending parent's custodial rights to the child, except to the extent necessary to further reunification efforts. This compromise would ensure that fit parents remain the prime decision makers in their child's life.

Footnotes

a1 Special thanks to Martin Guggenheim, Don Duquette, and Amy Sankaran for reviewing drafts of this Article and providing insightful feedback. I would also like to thank Ashley Thompson for her thorough research on this issue.

1 Throughout this Article, the terms "jurisdiction" and "dependency" will be used interchangeably to describe the act of the court transferring the custodial rights to the child from the parent to the state.

2 Since the majority of child welfare cases are brought against the child's mother, the offending parent will often be referred to as "she" and the nonoffending parent as "he." This is done for stylistic purposes only and in no way is meant to indicate any general belief about the proclivity of either gender to maltreat children.

3 Stanley v. Illinois, 405 U.S. 645, 649 (1972) ("[A]s a matter of due process of law, Stanley was entitled to a hearing on his fitness as a parent before his children were taken away from him ...."). These protections are set forth in state law. E.g., D.C. Code Ann. § 16-2316 (LexisNexis 2008); Mich. R. Ct., State 3.972.

4 See Astra Outley, Representation for Children and Parents in Dependency Proceedings 7 (The Pew Commission on Children in Foster Care, Background Paper 2003), available at http:// pewfostercare.org/research/docs/Representation.pdf (finding that thirty-nine states have statutes that provide for appointment of counsel for indigent parents in dependency cases). For examples of state statutes providing the right to counsel, see Ala. Code § 12-15-63 (LexisNexis 2005 & Supp. 2008); Colo. Rev. Stat. § 19-3-202 (2008); Ga. Code Ann. § 15-11-6 (2008).

5 See Santosky v. Kramer, 455 U.S. 745, 769-70 (1982) (holding that "clear and convincing" standard satisfies due process requirements in parental rights termination cases, though states can impose higher evidentiary burden).

6 M.L.B. v. S.L.J., 519 U.S. 102, 127-28 (1996) (quoting Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 27 (1981)). In Santosky, the Supreme Court observed that
[e]ven when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.
455 U.S. at 753-54.

7 Though much progress had been made in the past hundred years, procedural protections for offending parents still remain inadequate. Far too many children are removed from their homes each year, attorneys appointed to represent parents in child protective cases are often overworked and poorly compensated, and judges frequently fail to act as neutral decision makers there to safeguard the constitutional rights of families. See, e.g., Paul Chill, Burden of Proof Begone: The Pernicious Effect of Emergency Removal in Child Protective Proceedings, 41 Fam. Ct. Rev. 457, 457-59 (2003) (discussing statistics regarding high number of emergency child removal proceedings resulting in unnecessary removals, and difficulties faced by parents in trying to get their child back); Peggy Cooper Davis & Gautam Barua, Custodial Choices for Children at Risk: Bias, Sequentiality, and the Law, 2 U. Chi. L. Sch. Roundtable 139, 147-52 (1995) (addressing sources of bias in child custody proceedings); Kathleen A. Bailie, Note, The Other "Neglected" Parties in Child Protective Proceedings: Parents in Poverty and the Role of the Lawyers Who Represent Them, 66 Fordham L. Rev. 2285, 2310-13 (1998) (describing lack of adequate counsel for parents and resulting effects on indigent parents); Editorial, Giving Overmatched Parents a Chance, N.Y. Times, June 17, 1996, at A14 (identifying difficulties facing counsel appointed to parents in neglect hearings).

8 See Angela Greene, The Crab Fisherman and His Children: A Constitutional Compass for the Non-Offending Parent in Child Protection Cases, 24 Alaska L. Rev. 173, 189 (2007) (noting that only three states--New York, Maryland, and Pennsylvania--have "found that a child cannot be deemed dependent or neglected if a fit parent is available to care for that child").

9 See infra Part II for a description of various state approaches to adjudicating the rights of nonoffending parents. For an outline of various approaches, see Greene, supra note 8, at 181-99.

10 See, e.g., Greene, supra note 8, at 184-86 (describing Michigan's approach to custody proceedings).

11 Id. at 189-90.

12 In re Ryan W., No. A115424, 2007 WL 2588808, at *5 (Cal. Ct. App. Sept. 10, 2007); see also L.A. County Dep't of Children & Family Servs. v. John D. (In re James C.), 128 Cal. Rptr. 2d 270, 278-79 (Ct. App. 2002) (noting jurisdiction over child may be

granted based on actions of one parent alone); In re Alysha S., 58 Cal. Rptr. 2d 393, 396-97 (Ct. App. 1996) (rejecting father's claim that jurisdictional finding against one parent was not valid against the other).

13 See Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (recognizing, for first time, an individual constitutional right to "establish a home and bring up children"); Troxel v. Granville, 530 U.S. 57, 65 (2000) (describing right as "perhaps the oldest of the fundamental liberty interests"); Parham v. J.R., 442 U.S. 584, 602 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course."); Quilloin v. Walcott, 434 U.S. 246, 255 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected."); Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."); May v. Anderson, 345 U.S. 528, 534 (1953) ("[A] mother's right to custody of her children is a personal right entitled to at least as much protection as her right to alimony.").

14 Stanley v. Illinois, 405 U.S. 645, 649 (1972).

15 For example, in a recent article addressing this practice in Alaska, one author concluded that juvenile courts should have no authority to issue any orders regarding the child if a nonoffending parent seeks to care for his or her child, except to grant that parent long-term custody of the child immediately. Greene, supra note 8, at 199-201. But, as will be discussed more fully below, this solution would pose safety risks for the child, would deny the child the ability to receive much-needed services, and would deprive the offending parent of the opportunity to receive services to rectify the conditions that led to the maltreatment and perhaps regain custody of her child. Another scholar takes the opposite approach and proposes that the correct solution is to afford juvenile court judges vast discretion in determining the child's custody, even if a nonoffending parent is present and has not been judged to be unfit. Leslie Joan Harris, Involving Nonresident Fathers in Dependency Cases: New Efforts, New Problems, New Solutions, 9 J.L. & Fam. Stud. 281, 307 (2007). Professor Harris would permit the court to infringe upon the nonoffending parent's right to legal and physical custody if the judge feels that such action is in the "best interests of the child." Id. She writes, "A critical part of the solution to these problems is well-drafted statutes and rules that require judges to ensure children's safety and give them discretion to make dispositional orders that will serve the child's best interests." Id. This result, however, yields too much power to the court, which should not have the authority to issue any orders that infringe upon the nonoffending parent's custodial rights. A more nuanced approach is needed to guide policymakers confronting this complex issue.

16 Parens patriae, Latin for "ultimate parent or parent of the country," refers to the power of the state to usurp the legal rights of the natural parent, and to serve as the parent of any child who is in need of protection. Marvin Ventrell, The History of Child Welfare Law, in Child Welfare Law and Practice: Representing Children, Parents, and State Agencies in Abuse, Neglect, and Dependency Cases 113, 126-27 (Marvin Ventrell & Donald N. Duquette eds., 2005).

17 Id. at 117.

18 Mason P. Thomas, Jr., Child Abuse and Neglect Part I: Historical Overview, Legal Matrix and Social Perspectives, 50 N.C. L. Rev. 293, 324, 326 (1972). Thomas writes that the new juvenile court movement did "little more than confirm and extend the nineteenth-century philosophy of preventive penology" that justified state intervention in the family using informal procedures. Id. at 323. States gave themselves "broadly defined jurisdiction over neglected children, with little thought ... given to the rights of parents and children." Id.

19 Ventrell, supra note 16, at 126. The doctrine was based on English law that provided the crown with "supreme guardianship" over all children. Herbert H. Lou, Juvenile Courts in the United States 3 (Arno Press 1972) (1927). Lord Jekyll explained the doctrine in Eyre v. Shaftsbury, the leading English case decided in 1772:

The care of all infants is lodged in the king as parens patriae, and by the king this care is delegated to his Court of Chancery.... Idiots and lunatics, who are incapable to take care of themselves, are provided for by the king as parens patriae; and there is some reason to extend this care to infants.

Id. (alteration in original) (quoting Eyre v. Shaftsbury, (1722) 24 Eng. Rep. 659, 664 (Ch.)). This reasoning appears in early appellate decisions involving juvenile court decisions. See, e.g., Commonwealth v. Fisher, 62 A. 198, 200 (Pa. 1905) (describing Juvenile Court Act as "an exercise by the state of its supreme power over the welfare of its children ... under which it can take a child from its father and let it go where it will ... if the welfare of the child ... can be thus best promoted"). Under this doctrine, the state not only had the right but the obligation to establish standards for the child's care. Mary Virginia Dobson, The Juvenile Court and Parental Rights, 4 Fam. L.Q. 393, 396 (1970).

20 See Lou, supra note 19, at 5 ("It has been generally maintained that the juvenile court is but an embodiment in the law and in a specific institution of an ancient doctrine and of modern methods in the exercise of the power of the state as the ultimate parent of the child.").

21 See id. at 9 ("The tendency of American courts has been to repudiate the notion that there can be such a thing as a proprietary right to or interest in the custody of an infant."); William H. Sheridan, Children's Bureau, U.S. Dep't of Health, Educ., & Welfare, Standards for Juvenile and Family Courts 3 (1966) (observing that "some early writers ... tended to consider parental rights as merely a privilege or duty conferred upon the parent in the exercise of the police power of the State").

22 Lou, supra note 19, at 10 ("The most fundamental principle of the juvenile court--that juvenile-court acts are not criminal in their nature, because their purpose is not to punish but to save the child--has been almost universally affirmed by courts of last resort.").

23 Ventrell, supra note 16, at 132-33.

24 Lou, supra note 19, at 24.

25 Id.

26 See id. at 68 (noting that statutes give juvenile courts "broad jurisdiction and large discretionary powers"); Anthony M. Platt, The Child Savers: The Invention of Delinquency 135 (1969) (arguing that "such high standards of family propriety [were set] that almost any parent could be accused of not fulfilling his 'proper function'").

27 Lou, supra note 19, at 54.

28 See Comment, The Custody Question and Child Neglect Rehearings, 35 U. Chi. L. Rev. 478, 479 (1968) ("[T]he courts often rely on 'general grounds' rather than any precise finding when they find children neglected.").

29 Note, Child Neglect: Due Process for the Parent, 70 Colum. L. Rev. 465, 466 (1970).

30 Lou, supra note 19, at 99.

31 Ventrell describes the parens patriae mindset as one in which courts were entitled to take custody of a child, regardless of the status of the child as a victim or offender, "without due process of law, because of the state's authority and obligation to save children from becoming criminal[s]." Ventrell, supra note 16, at 126. One early court rationalized, "To save a child from becoming a criminal ... the Legislature surely may provide for the salvation of such a child ... by bringing it into one of the courts of the state without any process at all." Commonwealth v. Fisher, 62 A. 198, 200 (Pa. 1905).

32 See Bernard Flexner & Reuben Oppenheimer, Children's Bureau, U.S. Dep't of Labor, Pub. No. 99, The Legal Aspect of the Juvenile Court 8-9 (1922) ("The procedure of the court must be as informal as possible. Its purpose is not to punish but to save."); Susan Tiffin, In Whose Best Interest? Child Welfare Reform in the Progressive Era 223 (1982) (stating that staff in juvenile proceedings tried to make these proceedings as informal as possible). According to Tiffin, "[n]ormally the judge accepted the recommendation of the probation officer, since there was little time to devote to each case." Tiffin, supra, at 224.

33 The concept of summary, prompt procedures was key to the efficient juvenile court. For example, "[t]he original Illinois [Juvenile Court] Act provided that 'the court shall proceed to hear and dispose of the case in a summary manner.'" Monrad G. Paulsen & Charles H. Whitebread, Juvenile Law and Procedure 2 (1974) (quoting Ill. Laws 1899, 131-37 § 5).

34 See Lou, supra note 19, at 139 (suggesting that, especially in cases of dependency and neglect, juvenile courts should not refuse protection to child based on lack of "technical legal evidence").

35 Id. at 138 ("The better juvenile courts have been successful in discouraging the appearance of attorneys in most cases."); Sheridan, supra note 21, at 56 (observing that "in some courts counsel were not welcome - an attitude which was carried to the point of attempted exclusion"); Walter H. Beckham, Helpful Practices in Juvenile Court Hearings, Fed. Probation, June 1949, at 10, 13 ("In most juvenile proceedings, lawyers are not required and the majority of cases are heard without them."). Even as late as 1970, only a few states had extended a statutory right to counsel in abuse and neglect cases. Note, supra note 29, at 475.

36 See Monrad G. Paulsen, Juvenile Courts, Family Courts, and the Poor Man, 54 Cal. L. Rev. 694, 703 (1966) (writing that "[i]n juvenile court there were to be no adversaries, only friends of the child united in their desire to help him"). Many justified the procedural informality of this system by characterizing it as not criminal in nature, but there to further the interests of the child. Thus,

constitutional rights were not implicated and strict processes did not need to be followed. See Lou, supra note 19, at 10 ("If they are not of a criminal nature, they are not unconstitutional because of their non-conformance to certain constitutional guarantees."); Wright S. Walling & Stacia Walling Driver, 100 Years of Juvenile Court in Minnesota - A Historical Overview and Perspective, 32 Wm. Mitchell L. Rev. 883, 893-94 (2006) ("The power of the juvenile court to operate in this informal fashion was almost universally sustained in state courts by characterizing the proceedings as civil rather than criminal - an exercise of parens patriae power.").

37 Alfred J. Kahn, A Court for Children: A Study of the New York City Children's Court 100-01 (1953). Kahn describes one case in which the "judge so convinced himself" that the father was a gambler that he "became so angry that he sent the man out of the courtroom and did all the planning with the wife." Id. at 112.

38 See Lou, supra note 19, at 129 ("In order to secure the utmost possible simplicity, it has been found necessary in the hearing of children's cases to disregard the technicalities of procedure which are not absolutely necessary and which tend to confuse a child's mind.").

39 Id. at 129-30 (quoting Charles W. Hoffman, Saving the Child, 45 Surv. 704, 704-05 (1921)).

40 See id. at 54 (explaining that dependency and neglect are broadly defined to cover any child needing state's protection).

41 See id. at 8 ("Whether the rights of the parents are superior to those of the state or whether the state occupies the position of primary parent, it has been well conceded that the welfare of the child is the paramount consideration, and, in the matter of custody, this principle governs court decisions.").

42 Id. at 8-9.

43 13 Ohio App. 69 (Ct. App. 1920).

44 Bleier, 13 Ohio App. at 70, 74.

45 Id. at 76-77.

46 Id. at 74-75.

47 Id. at 75.

48 Id.

49 Bleier, 13 Ohio App. at 74-75.

50 171 P. 493 (Idaho 1918).

51 See Allen, 171 P. at 493 (setting forth mother's allegations).

52 Id. at 494.

53 Id.

54 Other cases during this period reflected the fundamental belief that the transfer of child custody from a parent to the court could occur in a summary manner without much regard to due process. See, e.g., Farnham v. Pierce, 6 N.E. 830, 831-32 (Mass. 1886) (stating that "proceeding is intended to be summary" and that no notice needs to be given and no complaint is required prior to committing child); State ex rel. Jones v. West, 201 S.W. 743, 744 (Tenn. 1918) ("The State, thus acting upon the assumption that its parentage supersedes all authority conferred by birth on the natural parents, takes upon itself the power and right to dispose of the custody of children, as it shall judge best for their welfare.").

55 See, e.g., Farnham, 6 N.E. at 832 (explaining that notice and trial are unnecessary in child commitment proceedings); Jones, 201 S.W. at 744 (recognizing that state has ultimate power to serve child's best interests).

56 262 U.S. 390 (1923).

57 Meyer, 262 U.S. at 396-97.

58 Id. at 399.

59 268 U.S. 510 (1925).

60 Pierce, 268 U.S. at 534-35.

61 Id. at 535.

62 321 U.S. 158 (1944).

63 Prince, 321 U.S. at 159, 165.

64 Id. at 165.

65 Wisconsin v. Yoder, 406 U.S. 205, 207, 234-36 (1972) (finding that First and Fourteenth Amendments prohibited state from making Amish children attend school until age sixteen when doing so violated parents' decisions about children's religious upbringing).

66 See, e.g., Troxel v. Granville, 530 U.S. 57, 60-63, 67 (2000) (holding unconstitutional state statute that permitted judge to allow grandparent visitation against parent's consent solely on determination that visits were in child's best interests).

67 See, e.g., Parham v. J.R., 442 U.S. 584, 620-21 (1979) (finding formal due process procedures were not constitutionally required when parents were seeking to commit their children to mental health institutions).

68 In Meyer v. Nebraska, the Court described Plato's conception of the Ideal Commonwealth: "That the wives of our guardians are to be common, and their children are to be common, and no parent is to know his own child, nor any child his parent." 262 U.S. 390, 401-02 (1925). The Court soundly rejected that idea. It stated, "Although such measures have been deliberately approved by men of great genius their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest." Id. at 402; see also Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925) ("The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children.").

69 Stanley v. Illinois, 405 U.S. 645, 646-47 (1972) (nothing that under state law children became wards of state upon death of unwed mother regardless of father's fitness as parent).

70 See id. at 647 (noting that state law presumed unwed fathers to be unfit).

71 405 U.S. 645 (1972).

72 Stanley, 405 U.S. at 646.

73 Id.; Brief for the Petitioner at *4, Stanley, 405 U.S. 645 (No. 70-5014).

74 Stanley, 405 U.S. at 647-50.

75 Id. at 648-49.

76 Id. at 649.

77 Id. at 656-57.

78 See id. at 651 (noting parent's rights to raise children should only be limited by strong countervailing forces).

79 Lehr v. Robertson, 463 U.S. 248, 261 (1983) (citation omitted).

80 463 U.S. 248 (1983).

81 Lehr, 463 U.S. at 264, 266-68.

82 Id. at 262.

83 434 U.S. 246 (1978).

84 Quilloin, 434 U.S. at 255.

85 441 U.S. 380 (1979).

86 Caban, 441 U.S. at 382.

87 Id. at 389 (noting that "an unwed father may have a relationship with his children fully comparable to that of the mother").

88 455 U.S. 745 (1982).

89 Santosky, 455 U.S. at 748.

90 452 U.S. 18 (1981).

91 Lassiter, 452 U.S. at 31-32 (leaving decision "whether due process calls for the appointment of counsel for indigent parents in termination proceedings to be answered in the first instance by the trial court").

92 519 U.S. 102 (1996).

93 M.L.B., 519 U.S. at 127-28.

94 E.g., id. (quoting Lassiter, 452 U.S. at 27).

95 See supra note 4 and accompanying text for a discussion of this point.

96 See, e.g., Mich. R. Ct., State 3.965(C) (permitting parent to contest foster care placement of child); Mich. R. Ct., State 3.972 (providing parent with right to trial within sixty-three days of child's removal from home).

97 See, e.g., Mich. R. Ct., State 3.922(A) (providing parents with discovery rights); Mich. R. Ct., State 3.972(C)(1) (applying rules of evidence to neglect trial); Mich. R. Ct., State 3.993 (outlining appellate rights for parents).

98 387 U.S. 1 (1967).

99 In re Gault, 387 U.S. at 41, 57.

100 Id. at 16.

101 Id.

102 Id. at 30 (quoting Kent v. United States, 383 U.S. 541, 555 (1966)).

103 See infra Part IV.A for a discussion of cases relying on the best interests of the child to justify actions against nonoffending parents.

104 Numerous cases in Ohio have removed the custody rights of the nonoffending parent. See, e.g., In re C.R., 843 N.E.2d 1188, 1192 (Ohio 2006) (concluding that court is not required to separately consider suitability of noncustodial parent before giving custody to nonparent); In re Russel, No. 06-CA-12, 2006 Ohio App. LEXIS 6565, at *5-6 (Ohio Ct. App. Nov. 27, 2006) (same); In re Osberry, No. 1-03-26, 2003 Ohio App. LEXIS 4922, at *8 (Ohio Ct. App. Oct. 14, 2003) (same). Michigan cases have been resolved in a manner similar to cases in Ohio. See, e.g., In re Camp, No. 265301, 2006 Mich. App. LEXIS 1620, at *1-2 (Mich. Ct. App. May 9, 2006) (explaining that there is no requirement to hold separate hearing before entering order involving placement of child with nonparent); In re Church, No. 263541, 2006 Mich. App. LEXIS 1098, at *4-6 (Mich. Ct. App. Apr. 11, 2006) (same); In re Stramaglia, No. 256133, 2005 Mich. App. LEXIS 1339, at *5-6 (Mich. Ct. App. May 26, 2005) (same).

105 See, e.g., In re C.R., 843 N.E.2d at 1192 ("When a juvenile court adjudicates a child to be abused, neglected or dependent, it has no duty to make a separate finding at the dispositional hearing that a non-custodial parent is unsuitable before awarding legal custody to a nonparent.").

106 See, e.g., In re B.C., No. 23044, 2006 Ohio App. LEXIS 3197, at *8-9 (Ohio Ct. App. June 28, 2006) (finding that supervision of placement with birth fathers was appropriate even without proof of parental unfitness).

107 See, for example, infra notes 108-16 and accompanying text for a discussion of In re Church, in which the court required the mother to comply with services before it decided whether to terminate her parental rights regarding her three children.

108 No. 263541, 2006 Mich. App. LEXIS 1098 (Mich. Ct. App. Apr. 11, 2006).

109 In re Church, 2006 Mich. App. LEXIS 1098, at *2.

110 Id.

111 Id.

112 Id.

113 Id. at *1-2.

114 In re Church, 2006 Mich. App. LEXIS 1098, at *4-5.

115 Id. at *7.

116 Id. at *8.

117 See supra note 104 for a sampling of these cases. Decisions in Michigan stripping nonoffending parents of their custodial rights have relied upon the holding of In re C.R., in which the Michigan Court of Appeals held that "[o]nce the family court acquires jurisdiction over the children," the court rule "authorizes the family court to hold a dispositional hearing 'to determine measures to be taken ... against any adult'" and "then allows the family court 'to order compliance with all or part of the case service plan and may enter such orders as it considers necessary in the interest of the child.'" 646 N.W.2d 506, 515 (Mich. Ct. App. 2002) (emphasis omitted) (alteration in original) (quoting Mich. R. Ct., State 5.973(A)).

118 890 N.E.2d 710 (Ill. App. Ct. 2008).

119 In re Y.A., 890 N.E.2d at 711-12.

120 Id. at 713.

121 Id.

122 Id. at 714.

123 No. CA2006-09-223, 2007 Ohio App. LEXIS 4181 (Ohio Ct. App. Sept. 10, 2007). Although the court recognized that both the United States and Ohio Constitutions afford a parent a fundamental right to the custody of his children, the court held that "'[t]he best interest of the child is the primary consideration' in such cases." In re M.D., 2007 Ohio App. LEXIS 4181, at *6 (quoting In re Allah, No. C-040239, 2005 Ohio App. LEXIS 1163, at *10 (Ohio Ct. App. Mar. 18, 2005)).

124 Id. at *3.

125 Id.

126 Id. at *1.

127 Id. at *8 (quoting In re C.R., 843 N.E.2d 1188, 1192 (Ohio 2006)).

128 In re M.D., 2007 Ohio App. LEXIS 4181, at *8 (quoting In re C.R., 843 N.E.2d at 1192).

129 405 U.S. 645 (1972).

130 See Stanley, 405 U.S. at 658 (holding that failure to provide unwed father a hearing on parental fitness qualifications prior to state's assumption of child custody, while affording a hearing to other parents, denies unwed father equal protection of law).

131 See, e.g., In re S.G., 581 A.2d 771, 781 (D.C. 1990) (observing that "child's best interest is presumptively served by being with a parent, provided that the parent is not abusive or otherwise unfit"); In re M.K., 649 N.E.2d 74, 80-82 (Ill. App. Ct. 1995) (permitting

court to take jurisdiction over child based on conduct of one parent but finding that physical custody of child should be awarded to fit parent); State v. Terry G. (In re Amber G.), 554 N.W.2d 142, 149 (Neb. 1996) (permitting trial court to order nonoffending parent to comply with services after finding of neglect but holding that "court may not properly deprive a biological or adoptive parent of the custody of the minor child unless it is affirmatively shown that such parent is unfit"); In re Bill F., 761 A.2d 470, 476 (N.H. 2000) (finding that court must give nonoffending parent full hearing at which state must prove unfitness prior to deprivation of physical custody, but noting that "[n]othing in this opinion should be read to prevent the State from ... providing social services for the benefit of a child"); New Mexico ex rel. Children, Youth & Families Dep't. v. Benjamin O., 160 P.3d 601, 609-10 (N.M. Ct. App. 2007) (noting that reversal of findings against father did not deprive trial court of ability to order him to comply with court-ordered services but required presumption that custody with father was in child's best interest); In re Christina L., 640 N.Y.S.2d 310, 310 (N.Y. App. Div. 1996) (finding that although trial court dismissed allegations against mother, it still had jurisdiction to enter orders pertaining to her); In re J.A.G., 617 S.E.2d 325, 332 (N.C. Ct. App. 2005) (finding that trial court erred in denying fit parent physical custody but still retained authority to proceed with case); In re N.H., 373 A.2d 851, 856 (Vt. 1977) (permitting court to adjudicate child as neglected based on findings against one parent but mandating that child be placed with other parent absent evidence of unfitness); State v. Gregory (In re Gregory R.S.), 643 N.W.2d 890, 901 (Wis. Ct. App. 2002) (stating that "children can be adjudicated to be in need of protection or services even when only one parent has neglected the children").

132 Cases from other jurisdictions are also instructive. See, e.g., Meryl R. v. Ariz. Dep't of Econ. Sec., 992 P.2d 616, 618 (Ariz. Ct. App. 1999) (finding that juvenile court correctly dismissed dependency case because child had noncustodial father who was ready and willing to parent him); In re Welfare of T.L.L., 453 N.W.2d 355, 357 (Minn. Ct. App. 1990) (holding that child is not dependent if nonoffending, custodial parent is adequately meeting child's needs).

133 855 So. 2d 175 (Fla. Dist. Ct. App. 2003).

134 J.P., 855 So. 2d at 175.

135 Id. at 176.

136 Id.

137 Id.

138 Fla. Stat. Ann. § 39.521(3)(b)(2) (West 2008 & Supp. 2009).

139 See B.C. v. Dep't of Children and Families, 864 So. 2d 486, 490 (Fla. Dist. Ct. App. 2004) (finding that, despite having superior right to custody of child, nonoffending parent could be ordered to comply with case plan).

140 Cal. Welf. & Inst. Code § 361.2(a) (West 2008).

141 Id. § 361.2(b)(3).

142 267 Cal. Rptr. 764 (Ct. App. 1990).

143 In re Jeffrey P., 267 Cal. Rptr. at 766.

144 Id. at 766, 768-69.

145 Id. at 768.

146 Id.

147 Stanley v. Illinois, 405 U.S. 645, 658 (1972).

148 530 U.S. 57 (2000).

149 Troxel, 530 U.S. at 78-79.

150 L.A. County Dep't of Children & Family Servs. v. John D. (In re James C.), 128 Cal. Rptr. 2d 270, 278 (Ct. App. 2002) (quoting In re Nicholas B., 106 Cal. Rptr. 2d 465, 472 (Ct. App. 2001)).

151 E.g., In re Sophie S., 891 A.2d 1125, 1133 (Md. Ct. Spec. App. 2006); In re S.J.-L., 828 A.2d 352, 356 (Pa. Super. Ct. 2003).

152 See In re Sophie S., 891 A.2d at 1133 (noting court previously held that where one parent is "able and willing" to care for child, court may not adjudge child to be in need of assistance).

153 Id.

154 Id.

155 757 A.2d 849 (Pa. 2000).

156 In re M.L., 757 A.2d at 850.

157 Id.

158 Id.

159 Id. at 851.

160 Id. at 849.

161 In re M.L., 757 A.2d at 851.

162 Id.

163 672 A.2d 109 (Md. Ct. Spec. App. 1996).

164 In re Russell G., 672 A.2d at 111.

165 Id.

166 Id. at 115.

167 Id. at 114.

168 Id. at 116.

169 See Md. Code Ann., Cts. & Jud. Proc. § 3-819(e) (LexisNexis 2006 & Supp.2008) ("If the allegations in the petition are sustained against only one parent of a child, and there is another parent available who is able and willing to care for the child, the court may not find that the child is a child in need of assistance, but, before dismissing the case, the court may award custody to the other parent.").

170 See In re Sophie S., 891 A.2d 1125, 1133 (Md. Ct. Spec. App. 2006) (stating that court could not make adjudication as to whether child was in need of assistance where nonoffending parent was able and willing to care for child); In re M.L., 757 A.2d 849, 851 (Pa. 2000) (holding that court lacks authority to remove child where noncustodial parent is available and willing to care for child).

171 See supra Part III for a discussion of the constitutional requirement that the state prove parental unfitness prior to depriving a parent of legal and physical custody of a child.

172 The foster care system should be seen as a place of last resort for children. Over half a million children remain in the system, and each year more children enter foster care than exit it. Children's Bureau, U.S. Dep't of Health & Human Servs., The AFCARS Report: Preliminary FY 2006 Estimates as of January 2008, at 1, 3-4 (2008), available at http:// www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report14.pdf. Social workers and attorneys handling these cases are overwhelmed. See The Annie E. Casey Found., The Unsolved Challenge of System Reform: The Condition of the Frontline Human Services Workforce 9 tbl.1 (2003) (observing that annual turnover rate in child welfare workforce is twenty percent for public agencies and forty percent for private agencies); Editorial, A Legal Hand for Foster Children, S.F. Chron., Sept. 28, 2005, at B8 ("[W]ith many of these lawyers burdened with overwhelming student loans, poorly compensated posts and outrageous caseloads, many are being forced out of these roles that foster children so desperately need."). Child abuse investigations are not completed in a timely fashion, social workers and attorneys do not visit children in their placements, and court hearings do not take place in accordance with federal guidelines. See Ben Kerman, What is ... the Child and Family Services Review?, Voice, Fall 2003, at 35, 35-36, available at http:// www.caseyfamilyservices.org/

pdfs/casey_whatis.pdf (explaining that majority of states reviewed were not in "substantial conformity" with number of outcomes factors, including protecting children from abuse and neglect and providing them with stable living conditions). On numerous occasions, child welfare agencies have lost track of children in their custody or have failed to monitor a child's placement, resulting in serious harm to the child. E.g., Michigan Agency Loses 302 Children, Associated Press, Aug. 30, 2002. Not surprisingly, children in foster care experience a wide range of problems, including mental health issues, poor academic performance, and involvement with the juvenile delinquency system. See, e.g., Children's Defense Fund, Summary: Improving Education for Homeless and Foster Children with Disabilities in the Individuals with Disabilities Education Improvement Act of 2004 (IDEA 2004) (P.L. 108-446), at 1 (2005), http://www.childrensdefense.org/child-research-data-publications/data/summary-improving-education-homeless-foster-children-disabilities-idea.pdf (observing that children in care are twice as likely to drop out of school and almost forty percent of children who age out of care will never receive a high school diploma).

173 State v. Gallardo-Cruz (In re S.G.), 166 P.3d 802, 806 (Wash. Ct. App. 2007).

174 Each year, states disburse more $10 billion in federal and state funds to pay for housing and support services for children in foster care. Rob Geen et al., Medicaid Spending on Foster Children, in 2 Child Welfare Research Program 1 (The Urban Inst., 2005); see also Cynthia Andrews Scarcella et al., The Urban Inst., The Cost of Protecting Vulnerable Children V: Understanding State Variation in Child Welfare Financing 6 (2006), available at http://www.urban.org/UploadedPDF/311314_vulnerable_children.pdf (reporting that, in 2004, states spent over $23 billion on child welfare programs). States spend an additional $1.8 billion on administering the child welfare system. Id. at 11 tbl.2. The costs of placements vary from state to state and by type of placement. For example, it costs New York City roughly twenty-eight dollars a day to keep a child in foster care. Leslie Kaufman, Bill to Save Foster Care Costs Is Stalled in the Legislature, N.Y. Times, July 21, 2004, at B2. A North Carolina study revealed the following daily costs for children's foster care placements: $12.01 (family foster care), $66.30 (specialized foster care), $129.93 (large group home), $132.86 (small group home), and $148.17 (emergency and other placements). Richard P. Barth et al., A Comparison of the Governmental Costs of Long-Term Foster Care and Adoption, 80 Soc. Serv. Rev. 127, 136 tbl.1 (2006). After a child is placed with a nonoffending parent, many of these costs would disappear.

175 See, e.g., B.C. v. Dep't of Children & Families, 864 So. 2d 486, 490 (Fla. Dist. Ct. App. 2004) (finding that court could order nonoffending parent to comply with case plan).

176 The Washington State Court of Appeals emphasized this point in reversing a termination of parental rights decision in In re S.G., 166 P.3d 802, 803 (Wash. Ct. App. 2007). In that case, the state required the father to participate in services to address deficiencies without first proving the existence of those deficiencies. Id. at 805-06. The court held that "the more basic problem is that it is impossible to evaluate the sufficiency or efficacy of services as to [the father] when, at this point, the State failed to show he required any. Without a problem, there can be no solution." Id. at 806.

177 See E. Allan Lind & Tom R. Tyler, The Social Psychology of Procedural Justice 71 (1988) (stating that individuals' perception of fairness strongly informs their satisfaction and general affect towards encounters with procedural justice); Tom R. Tyler & Yuen J. Huo, Trust in the Law: Encouraging Public Cooperation with the Police and Courts 51, 93 (2002) (discussing procedural justice models and stating that cooperative overtures by authorities and courts lead to reciprocal cooperative behavior by individuals); Tom R. Tyler, Why People Obey the Law 115, 129, 137 (1990) (stating that perceived fairness by individuals of justice system is influenced by factors such as efforts to grant greater process control and consideration of their views). See generally Tom R. Tyler, What Is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures, 22 Law & Soc'y Rev. 103 (1988) (analyzing interactions between citizens and legal authorities from procedural justice perspective to determine factors influencing procedural fairness).

178 See Tyler & Huo, supra note 177, at 90 (noting that courts can increase compliance by enacting procedures that are "fair and appropriate").

179 Cf. Kees van den Bos et al., When Do We Need Procedural Fairness? The Role of Trust in Authority, 75 J. of Personality & Soc. Psychol. 1449, 1455 (1998) (discussing study of individuals' reactions to authority in which individuals given opportunities to voice their opinions reported higher satisfaction levels than those who were not); Gary B. Melton & E. Allan Lind, Procedural Justice in Family Court: Does the Adversary Model Make Sense?, in Legal Reforms Affecting Child & Youth Services 65, 66 (Gary B. Melton ed., 1982) (discussing push for less adversarial procedures in child custody cases to avoid institutionalizing and exacerbating tensions among family members).

180 Tyler, supra note 177, at 116, 127.

181 Id. at 137; van den Bos et al., supra note 179, at 1452; Tyler, supra note 177, at 105, 107.

182 Tyler, supra note 177, at 138; Tyler, supra note 177, at 129.

183 See supra Parts IV.A-B for a discussion of this point.

184 See In re Irwin, No. 229012, 2001 Mich. App. LEXIS 2088, at *12 (Mich. Ct. App. July 13, 2001) (Whitbeck, J., concurring) (observing that child welfare agency "could make a calculated guess concerning which parent was less likely to demand a jury trial [and] proceed only against that parent, ... simply in order to preclude one parent from demanding a jury trial").

185 People ex rel. U.S., 121 P.3d 326, 328 (Colo. App. 2005).

186 See supra Part IV.C for a discussion of the hands-off approach of Maryland and Pennsylvania courts.

187 See, e.g., In re Sophie S., 891 A.2d 1125, 1133 (Md. Ct. Spec. App. 2006) (holding juvenile court will not adjudicate assistance petition when one parent is "able and willing to provide care"); In re S.J.-L., 828 A.2d 352, 356 (Pa. Super. Ct. 2003) (affirming termination of abused child's dependency status proceedings where noncustodial parent was "ready, willing, and able" to care for child).

188 In re Sophie S., 891 A.2d at 1133 (citing Md. Code Ann., Cts. & Jud. Proc. § 3-819(e)); In re S.J.-L., 828 A.2d at 355.

189 Statement by Lex Frieden, Chairperson, Nat'l Council on Disability, Statement to the U.S. Senate Committee on Governmental Affairs: Castaway Children: Must Parents Relinquish Custody in Order to Secure Mental Health Services for Their Children? (June 10, 2003).

190 Id.

191 See id. (observing that "[i]nadequate funding of mental health services and supports for children and their families is the major reason families turn to the child welfare system for help"). In his statement, Frieden cites to several studies supporting his statement, including one by the Commonwealth Institute for Child and Family Studies which found that, in sixty-two percent of states, the child welfare agency used a custody transfer to gain access to state funding for services for children with serious emotional and behavioral problems. Id. at n.16. Thirty-eight percent of the responding child welfare agencies used custody transfers to obtain funding for children's treatment. Id.

192 42 U.S.C. § 671(a)(15)(B) (2006). State courts have interpreted this requirement to impose an obligation on states to reunify children with the parent from whose care they were removed. See, e.g., State v. Daniel M. (In re Ethan M.), 723 N.W.2d 363, 370-71 (Neb. Ct. App. 2006) (finding state had to make efforts to reunify child with custodial parent). But see L.A. County Dep't of Children & Family Servs. v. Patricia O. (In re Patricia T.), 109 Cal. Rptr. 2d 904, 908-09 (Ct. App. 2001) (affirming trial court's decision denying offending parent reunification services when child was placed with nonoffending parent); R.W. v. Dep't of Children & Families, 909 So. 2d 402, 403 (Fla. Dist. Ct. App. 2005) (holding that substantial compliance with services did not mandate reunification with offending parent when child was placed with nonoffending parent); In re T.S., 74 P.3d 1009, 1018 (Kan. 2003) (finding that reasonable efforts requirement could be satisfied by reunifying child with noncustodial parent).

193 In re Sophie S., 891 A.2d at 1133 (citing Md. Code Ann., Cts. & Jud. Proc. § 3-819(e)); In re S.J.-L., 828 A.2d at 356.

194 See In re N.H., 373 A.2d 851, 855 (Vt. 1977) ("In lieu of such a finding and the concomitant lack of jurisdiction, there is a strong possibility that the child will be returned to the same situation from which it has been taken.").

195 This problem would be exacerbated by the fact that many family courts remain fragmented and, often, numerous judges hear cases involving the same litigants. See Judith D. Moran, Fragmented Courts and Child Protection Cases: A Modest Proposal for Reform, 40 Fam. Ct. Rev. 488, 488 (2002) (noting that family law matters span multiple categories and jurisdictions, sometimes proceeding in both criminal and civil arenas). Moran writes, "The ills created and perpetuated by this patchwork court system addressing family matters wreak havoc on the fabric of family life," and often, "[f]amilies lose precious time getting help because the system fails to facilitate connections to necessary services." Id. at 489. Some jurisdictions have responded by creating unified family courts permitting judges to hear all matters involving the same family. See, e.g., D.C. Code Ann. § 11-1104(a) (LexisNexis 2008) ("To the greatest extent practicable, feasible, and lawful, if an individual who is a party to an action or proceeding assigned to the Family

Court has an immediate family or household member who is a party to another action or proceeding assigned to the Family Court, the individual's action or proceeding shall be assigned to the same judge or magistrate judge to whom the immediate family member's action or proceeding is assigned."); Mich. Comp. Laws Ann. § 600.1023 (West Supp. 2008) ("When 2 or more matters within the jurisdiction of the family division of circuit court involving members of the same family are pending in the same judicial circuit, those matters, whenever practicable, shall be assigned to the judge to whom the first such case was assigned."). But, fragmented systems still characterize many jurisdictions across the country. Moran, supra, at 488.

196 See Md. Code Ann., Cts. & Jud. Proc. § 3-819(e) (LexisNexis 2006 & Supp. 2008) (permitting court to award permanent custody to nonoffending parent after petition is sustained as to other parent); In re M.L., 757 A.2d 849, 851 n.3 (Pa. 2000) (allowing trial courts to use their equitable powers to award nonoffending parent custody).

197 See Harris, supra note 15, at 306 (commenting that "the former custodial parent is not dead, and she and the child continue to have claims to a relationship with each other and statutory rights to state assistance to protect that relationship").

198 See supra Part IV.C for a discussion of how Maryland and Pennsylvania courts relinquish jurisdiction after the child is no longer dependent on the court.

199 A parent seeking to modify a custody order must prove that there has been a substantial and material change of circumstance and that the modification is in the child's best interests, a high burden as described by state courts. See, e.g., San Marco v. San Marco, 961 So. 2d 967, 970 (Fla. Dist. Ct. App. 2007) (holding modifications must be in best interests of child and requiring materially altered conditions of substantial degree for approval of modification (citing Wade v. Hirschman, 903 So. 2d 928, 932-33 (Fla. 2005))); Levin v. Levin, 836 P.2d 529, 532 (Idaho 1992) ("The party seeking modification clearly has the burden of justifying a change in custody, ... and although the threshold question is whether a permanent and substantial change in the circumstances has occurred, the paramount concern is the best interest of the child."); Baxendale v. Raich, 878 N.E.2d 1252, 1255 (Ind. 2008) ("Modifications are permitted only if the modification is in the best interests of the child and there has been 'a substantial change'.").

200 The Supreme Court has recognized that parents do not lose their constitutionally protected interest in their children because they have lost temporary custody of them. Santosky v. Kramer, 455 U.S. 745, 753 (1982) ("Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life.").

201 The court, however, would not need to find the nonoffending parent unfit prior to returning the child to the custody of the offending parent. Custody transfers from one parent to another can occur after the court makes a finding that the transfer is in the best interests of the child. Kauten v. Kauten, 261 A.2d 759, 760 (Md. 1970).

202 Few courts have adopted this type of approach. One example is seen in People ex rel. U.S., where the county Department of Human Services filed a petition alleging that the child's environment was harmful to his welfare. 121 P.3d 326, 326 (Colo. Ct. App. 2005). The father admitted portions of the petition, but the mother requested a trial before a jury, which found in favor of the mother. Id. The trial court entered a dispositional order in which it found that it had jurisdiction over the father, but not the mother, and required the father to participate in a treatment plan. Id. at 327. The guardian ad litem requested that the mother be required as well to comply with services but the court refused, concluding that it had no jurisdiction to do so. Id. The guardian ad litem appealed. Id.
The Colorado Court of Appeals sided with the trial court and ruled that findings made against one parent cannot form the basis for requiring the other parent to comply with the treatment plan. People ex. rel. U.S., 121 P.3d at 328. The father's admissions gave the court limited jurisdiction as to him but not as to the mother. Thus, the trial court's decision to force the father to participate in services was appropriate as was its finding that it could not issue any orders affecting the mother's custodial rights. Id. ("Nothing in the statute grants a court the power to impose a treatment plan on a parent when the child has not been found to be dependent and neglected by that parent.").

203 One additional factor to consider is the high rate of turnover among caseworkers involved in the child welfare system. "Ninety percent of state child welfare agencies report difficulty in recruiting and retaining workers." Sandra Stukes Chipungu & Tricia B. Bent-Goodley, Meeting the Challenges of Contemporary Foster Care, 14 Future of Children 75, 83 (2004). The annual turnover rate in the child welfare workforce is twenty percent for public agencies and forty percent for private agencies. The Annie E. Casey Foundation, supra note 172, at 9 tbl.1. Thus, often, caseworkers do not get to know children on their caseloads well.

204 See Stanley v. Illinois, 405 U.S. 645, 652-53 (1972) (observing that "the State registers no gain towards its declared goals when it separates children from the custody of fit parents" and, in fact, it "spites its own articulated goals when it needlessly separates [a child] from his family").

205 See supra note 181 for a description of some of the problems children face in foster care. For a comprehensive discussion of these issues, see generally Gloria Hochman et al., The Pew Comm'n on Children in Foster Care, Foster Care: Voices From the Inside, available at http:// pewfostercare.org/research/voices/voices-complete.pdf.

206 Children's Rights Inc., a nonprofit legal organization based in New York City, has litigated numerous class action cases which have resulted in federal court oversight over state child welfare systems. See Children's Rights, Legal Cases, http:// www.childrensrights.org/reform-campaigns/legal-cases/ (last visited Nov. 6, 2009) (listing ongoing and completed cases handled by Children's Rights Inc.). This list only represents a partial summary of successful systemic actions brought against dysfunctional child welfare systems. See, e.g., Child Welfare League of Am. & ABA Ctr. on Children and the Law, Child Welfare Consent Decrees: Analysis of Thirty-Five Court Actions From 1995 to 2005, at 2 (2005), available at http:// www.cwla.org/advocacy/ consentdecrees.pdf (finding that twenty-one states were either currently under court-approved consent decree or court order, or had pending litigation brought against their child welfare agencies).

207 Parham v. J.R., 442 U.S. 584, 603 (1979).

82 TMPLR 55

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EXHIBIT C

2007 WL 2584831

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio,
Twelfth District, Butler County.

In the Matter of M.D.

No. CA2006-09-223. | Decided Sept. 10, 2007.

Appeal from Butler County Court of Common Pleas, Juvenile Division, Case No. JN2004-0072.

Attorneys and Law Firms

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Fred S. Miller, Hamilton, OH, for appellees, William & Irene D.

Opinion

POWELL, J.

*1 {¶ 1} Appellant, Terri W., appeals the decision of the Butler County Court of Common Pleas, Juvenile Division, granting legal custody of her daughter, M.D., to the child's paternal grandparents, appellees, Irene and William D.[1] For the reasons set forth below, we affirm the trial court's judgment.

{¶ 2} M.D. was born on May 30, 1996. Her mother, appellant, and father, Mark D., who is not a party to this appeal, were married at the time. When appellant and Mark D. later divorced in 2000, Mark D. was granted legal custody of M.D. Appellant was granted legal custody of her other daughter, K.D., at that time, along with visitation with M.D. on weekends and holidays.

{¶ 3} M.D. has resided off and on with appellees for the majority of her life, including time periods when appellant and Mark D. were married, and after Mark D. was granted legal custody of M.D. While Mark D. and M.D. were living with appellees, Mark D. was arrested on sexual abuse charges involving M.D. He was later convicted of multiple sexually-oriented offenses and sentenced to a term of life in prison.

{¶ 4} In January 2004, following Mark D.'s arrest, appellees were granted temporary custody of M.D. pursuant to an emergency order. On May 19, 2004, M.D. was adjudicated an abused and dependent child, and placed in the temporary custody of appellees. The Butler County Children Services Board (BCCSB) subsequently filed a motion for legal custody on behalf of appellees, and custody hearings were held from February 14, 2005 to March 7, 2006. At the conclusion of the hearings, the magistrate granted appellees legal custody of M.D., and granted appellant visitation. Appellant's objections to the magistrate's order were subsequently overruled on August 7, 2006.

{¶ 5} Appellant now appeals the trial court's decision granting legal custody of M.D. to appellees, advancing three assignments of error.

{¶ 6} Assignment of Error No. 1:

{¶ 7} "[R.C. 2151.353(A)(3)] IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED TO [APPELLANT'S] CASE. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT AWARDED CUSTODY TO A NON-PARENT RELATIVE WHEN THE MOTHER WAS NOT UNSUITABLE."

{¶ 8} In her first assignment of error, appellant challenges the constitutionality of R.C. 2151.353(A)(3) on its face and as applied to her in this case, asserting, generally, that the statute violates due process requirements. Appellant contends the statute infringes on a natural parent's fundamental right to the custody of his or her child because it does not require a trial court to make a separate finding that the natural, noncustodial parent of a child previously adjudicated abused, neglected or dependent is unfit before the court may award legal custody of the child to a nonparent relative. We find this argument without merit.

{¶ 9} "An enactment of the General Assembly is presumed to be constitutional, and before a court may declare it unconstitutional it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible." *Woods v. Telb,* 89 Ohio St.3d 504, 510-511, 2000-Ohio-171, quoting *State ex rel. Dickman v.*

Dejenbacher (1955), 164 Ohio St. 142, paragraph one of the syllabus. "The party challenging the statute bears the burden of proving the unconstitutionality of the statute beyond a reasonable doubt." *Id.* at 511.

*2 {¶ 10} "A facial challenge to a statute is the most difficult to bring successfully because the challenger must establish that there exists no set of circumstances under which the statute would be valid." *Harrold v. Collier*, 107 Ohio St.3d 44, 2005-Ohio-5334, ¶ 37, citing *United States v. Salerno* (1987), 481 U.S. 739, 745, 107 S.Ct. 2095. "The fact that a statute might operate unconstitutionally under some plausible set of circumstances is insufficient to render it wholly invalid." *Id.* Further, in an "as applied" challenge to a statute, the challenging party bears the burden of presenting "clear and convincing evidence of a presently existing set of facts that makes the statutes unconstitutional and void when applied to those facts." *Id.*, citing *Belden v. Union Cent. Life Ins. Co.* (1944), 143 Ohio St. 329, paragraph six of the syllabus.

{¶ 11} Appellant challenges the constitutionality of R.C. 2151.353(A)(3), which provides as follows: "If a child is adjudicated an abused, neglected, or dependent child, the court may * * * [a]ward legal custody of the child to either parent or to any other person who, prior to the dispositional hearing, files a motion requesting legal custody of the child or is identified as a proposed legal custodian in a complaint or motion filed prior to the dispositional hearing by any party to the proceedings."

{¶ 12} While both the United States and Ohio Constitutions afford parents a fundamental right to the custody of their children, (See *In re James*, 113 Ohio St.3d 420, 2007-Ohio-2335, ¶ 16; *In re Hockstok*, 98 Ohio St.3d 238, 2002-Ohio-7208, ¶ 16), custody determinations made pursuant to R.C. 2151.353(A)(3) require a court to consider the best interest of the child. See *In re A. W.-G.*, Butler App. No. CA2003-04-099, 2004-Ohio-2298, ¶ 6. "The best interest of the child is the primary consideration" in such cases. *In re Allah*, Hamilton App. No. C-040239, 2005-Ohio-1182, ¶ 10.

{¶ 13} The Ohio Supreme Court recently examined R.C. 2151.353(A)(3) in the case of *In re C.R.*, 108 Ohio St.3d 369, 2006-Ohio-1191. Similar to appellant in this case, the natural, noncustodial parent in *C.R.* sought legal custody of his child, who had previously been adjudicated neglected based upon allegations concerning the custodial parent. Like appellant, the noncustodial parent seeking legal custody in *C.R.* argued that a court should be required to find each parent unsuitable before it may award legal custody of an abused, neglected or dependent child to a non parent relative. He further argued that his "fundamental right to raise his * * * child should not be taken away by implication and that it is unfair for a parent to be penalized for the neglect by the other parent." *Id.* at ¶ 11.[2]

{¶ 14} The court, however, rejected appellant's arguments and held that "when a juvenile court adjudicates a child to be abused, neglected, or dependent, it has no duty to make a separate finding at the dispositional hearing that a noncustodial parent is unsuitable before awarding legal custody of a child to a non-parent relative." *Id.* at ¶ 24. The court found that an adjudication of abuse, neglect or dependency "is a determination about the care and condition of a child and implicitly involves a determination of the unsuitability of the child's custodial and/or noncustodial parents." *Id.* at ¶ 23.

*3 {¶ 15} Significantly, in reaching this conclusion, the court emphasized the difference between legal and permanent custody, in that "legal custody does not divest parents of residual parental rights, privileges, and responsibilities." *Id.* at ¶ 21. As such, a disposition pursuant to R.C. 2151.353(A)(3) does not "permanently foreclose the right of either parent to regain custody, because it is not a termination of all residual parental rights, privileges, and responsibilities." *Id.* at ¶ 23. Either parent may therefore petition the court for a modification of custody. *Id.*[3]

{¶ 16} Here, the record demonstrates that M.D. was adjudicated abused and dependent on May 19, 2004. Appellant received notice of and was represented by counsel at the adjudication hearing. During the hearing, the court determined M.D. to be abused and dependent based upon "stipulations and testimony on the record." Notably, appellant did not object to the court's adjudication of M.D. as abused and dependent, and that matter is not before this court.

{¶ 17} When BCCSB filed a motion for legal custody of M.D. on behalf of appellees, appellant responded with her own motion for legal custody of M.D. The court held custody hearings spanning a period of several days, during which an extensive amount of testimony and documentary evidence was presented. At the conclusion of the hearings, the court applied the best interest of the child standard, set forth in R.C. 3109.04(F), and found it was in M.D.'s best interest to grant

appellees legal custody of the child and to allow appellant visitation.

{¶ 18} The court's prior adjudication of M.D. as abused and dependent permitted the court to grant legal custody of the child to a nonparent upon a finding it was in the child's best interest. See *In re C.R.* at ¶ 24. See, also, *In re A. W.-G.* at ¶ 6, 11. Under the authority of *C.R.*, the court was not required to find appellant unsuitable before making such disposition, as the court's previous adjudication of M.D. as abused and dependent implicitly involved a finding of appellant's unsuitability. See *In re C.R.* at ¶ 22-24.

{¶ 19} As emphasized by the court in *C.R.*, this procedure does not constitute a "termination of all residual parental rights, privileges, and responsibilities," and therefore, does not foreclose the ability of appellant to seek a change of custody in the future, in accordance with R.C. 2151.42. *Id.* at ¶ 23. Although appellant argues she *could be* denied the opportunity to raise M.D. indefinitely under this procedure, appellant has not filed a motion for a change of custody and any argument concerning that issue is therefore not ripe for review at this time.

{¶ 20} Based upon the foregoing, we find appellant has failed to demonstrate beyond a reasonable doubt that R.C. 2151.353(A)(3) is unconstitutional. Appellant has failed to demonstrate the statute violates due process requirements, as the statute applies where a child has previously been adjudicated abused, neglected or dependent. As indicated in *C.R.*, such an adjudication implicitly involves a determination of parental unsuitability. In addition, in applying R.C. 2151.353(A)(3), a court must make its custody determination in accordance with the best interest of the child. Because such determinations do not terminate all residual parental rights, privileges, and responsibilities, however, procedures remain in place for a natural parent to regain custody of his or her child. Accordingly, we overrule appellant's first assignment of error.

*4 {¶ 21} Assignment of Error No. 2:

{¶ 22} "THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT AWARDED CUSTODY TO [APPELLEES] WHICH WAS NOT IN THE CHILD'S BEST INTERESTS."

{¶ 23} Assignment of Error No. 3:

{¶ 24} "THE COURT'S CUSTODY ORDER IS NOT IN THE CHILD'S BEST INTERESTS AND IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 25} In her second and third assignments of error, appellant argues the trial court erred in awarding legal custody of M.D. to appellees upon a finding that such placement was in the child's best interest. We disagree.

{¶ 26} As stated, upon adjudicating a child as abused, neglected, or dependent, a juvenile court may award legal custody of a child to a parent or a nonparent upon a timely motion. R.C. 2151.353(A)(3). A court must make its custody decision in accordance with the best interest of the child. *In re A. C.*, Butler App. No. CA2006-12-105, 2007-Ohio-3350, ¶ 14; *In re A. W.-G.*, 2004-Ohio-2298 at ¶ 6. Unlike in a permanent custody proceeding where a juvenile court's standard of review is by clear and convincing evidence, a juvenile court's standard of review in legal custody proceedings is by a preponderance of the evidence. *Id.; In re Nice* (2001), 141 Ohio App.3d 445, 455; *In re A. W.-G.* A preponderance of the evidence is "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it." *In re A. W.-G.* at fn. 1.

{¶ 27} A juvenile court's custody decision will not be reversed absent an abuse of discretion. *In re A.C.* at ¶ 15. The discretion granted to a juvenile court in custody matters "should be accorded the utmost respect, given the nature of the proceeding and the impact the court's determination will have on the lives of the parties concerned. The knowledge a trial court gains through observing the witnesses and the parties in a custody proceeding cannot be conveyed to a reviewing court by a printed record." *In re A. W.G.*, quoting *Miller v. Miller* (1988), 37 Ohio St.3d 71, 74. Thus, an appellate court affords deference to a judge or magistrate's findings regarding witness credibility. *In re A.C.* at ¶ 15, citing *In re D.R.*, Butler App. Nos. CA2005-06-150, CA2005-06-151, 2006-Ohio-340, ¶ 12.

{¶ 28} In addition, "in determining whether a decision of a trial court is against the manifest weight of the evidence, an appellate court is guided by the presumption that the trial court's findings were correct." *In re Peterson* (Aug. 28, 2001), Franklin App. No. 01AP-381, at 3, citing *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80. "Where an award of custody is supported by a substantial amount of credible and competent evidence, such an award will not be reversed as being against the weight of the evidence by a reviewing

court." *Davis v. Flickinger*, 77 Ohio St.3d 415, 418, 1997-Ohio-260, quoting *Bechtol v. Bechtol* (1990), 49 Ohio St.3d 21, syllabus.

*5 {¶ 29} Our review of the record indicates that the trial court considered the relevant factors in making its best interest determination, and that the evidence presented during the custody hearings supports the trial court's findings. The record indicates that M.D. has been in the temporary custody of appellees since January 2004. Before that time, M.D. had resided with appellees for a significant portion of her life, both when appellant and the child's father, Mark D., were married, and when Mark D. had custody of M.D. following the couple's divorce. Appellant has regular visitation with M.D., during which M.D. has contact with her sister, K.D.

{¶ 30} The evidence presented during the custody hearings demonstrates that M.D. is well-adjusted in appellees' home and is involved in various activities such as church, choir, and Big Brothers Big Sisters. The evidence also demonstrates that M.D. is attending school where she receives special attention due to learning disabilities and that she is currently doing well in school. Appellees have also hired a tutor for M.D. in the summer. Her performance in school has improved and M.D. is considered by school officials to be a good student. Appellees are active in M.D.'s schooling and regularly attend school-related conferences and functions. The trial court found that awarding appellant custody of M.D. would result in M.D. having to change schools, and that such change would not be in her best interests if it were to occur during the school year.

{¶ 31} In addition, the record indicates that appellees have been diligent and supportive in assuring that M.D. participates in regular therapy sessions with Melanie Grosser of Catholic Social Services. M.D. attends therapy sessions to help her cope with the abuse she suffered by her father and to help her establish personal boundaries that were compromised as a result of such abuse. Grosser testified that M.D. will need on-going therapy for an indefinite period of time to cope with these issues. She also indicated that appellees are cooperative and attentive in attending sessions when necessary, in assuring M.D.'s attendance, and in following suggestions she makes for M.D.'s behavioral and psychological growth.

{¶ 32} Significantly, the evidence presented during the custody hearings indicates that appellees are also cooperative in facilitating and complying with visitation between appellant and M.D.

{¶ 33} With respect to appellant, the record indicates that she has experienced a significant period of residential instability within the past several years. She has been homeless at various times in the past and has lived at numerous residences. At present, appellant is cohabiting with Carl Lawson and her other daughter, K.D. While she reports that she and Lawson have a strong and stable relationship, the testimony presented during the custody hearings demonstrates that appellant has filed a domestic violence complaint against Lawson as recently as 2004.

*6 {¶ 34} The record indicates appellant has had numerous other live-in boyfriends in the past several years as well. In addition, there have been allegations of sexual abuse involving appellant's other daughter, K.D., while K.D. was living with appellant. Notably, Dr. Moore evaluated appellant prior to trial and concluded that placement of M.D. in her care would not be appropriate due to appellant's psychological problems and instability. He based his conclusion in part on appellant's own history of abuse by her father, removal from her mother and placement in foster care when she was a child, and mental health issues for which she has been treated with psychotropic medications.

{¶ 35} Grosser also testified during the custody hearings that M.D. felt conflicted in choosing with whom she wanted to live, though it was clear that she loves both her mother and grandparents very much. The trial court conducted an in camera interview with the child to determine whether she was capable of making such a choice, and if so, with whom she wanted to live. The court indicated following the interview that it was clear appellant had exerted significant influence over what M.D. reported to the court, and had provided her with information concerning the case in an effort to manipulate her loyalties.

{¶ 36} While appellant argues that granting legal custody of M.D. to appellees is not in the child's best interest because appellees are "in denial" about their son's guilt, reside in the same house where M.D.'s father abused her, and because appellee, Irene D., has a history of depression, our review of the record indicates the trial court thoroughly considered both the beneficial and detrimental aspects of placing M.D. with either party in making its best interest determination. The court found it was in M.D.'s best interest to be placed in a stable environment with parental figures who can provide and model appropriate behavior, and understand her psychological needs resulting from her abuse by her father.

The trial court was permitted to make its determination based upon its observation of the witnesses and to resolve issues concerning witness credibility, sincerity and truthfulness accordingly. See *Davis,* 77 Ohio St.3d at 418-419.

{¶ 37} After thoroughly reviewing the record, we find that the evidence presented at the custody hearings supports the trial court's findings, and that the trial court did not abuse its discretion in granting legal custody of M.D. to appellees. Our review of the record indicates that competent, credible evidence supports the trial court's determination that granting legal custody of M.D. to appellees was in the child's best interest. Appellant's second and third assignments of error are therefore overruled.

{¶ 38} Judgment affirmed.

YOUNG, P.J. and BRESSLER, J., concur.

Parallel Citations

2007 -Ohio- 4646

Footnotes

1 For purposes of clarity in this opinion, we refer to M.D.'s grandparents, Irene and William D., as "appellees." Butler County Children Services Board and M.D.'s guardian ad litem, Brian Harrison, are also appellees herein.

2 In *C.R.,* the natural father of the child at issue sought legal custody following the juvenile court's adjudication of the child as neglected. The father learned of his paternity of the child after the children services board filed a complaint alleging the child was neglected based upon the child's mother having a substance abuse problem. The complaint named "John Doe" as the child's father, but after confirming his paternity of the child, the natural father began attending the court proceedings. The court later adjudicated the child neglected. After legal custody motions were filed by both the natural father and the child's aunt and uncle, the court held custody hearings and granted legal custody to the aunt and uncle. The natural father appealed, and the Eighth District Court of Appeals reversed on the basis the trial court was required to find the natural father unsuitable before awarding legal custody to a nonparent. The Eighth District thereafter certified a conflict between its decision and that of other districts to the Ohio Supreme Court.

3 Notably, the Ohio Supreme Court recently ruled that R.C. 3109.04(E)(1)(a), concerning the modification of a prior decree allocating parental rights and responsibilities, is constitutional. *In re James,* 113 Ohio St.3d 420, 2007-Ohio-2335.

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EXHIBIT D

27 No. 9 Child L. Prac. 129

Child Law Practice
November, 2008

Engaging Fathers
Article #1 in a Series

ADVOCATING FOR THE CONSTITUTIONAL RIGHTS OF NONRESIDENT FATHERS

Vivek S. Sankaran [a1]

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Months after a child welfare case is petitioned, a nonresident father appears in court and requests custody of his children who are living in foster care. Little is known about the father, and immediately, the system--judge, caseworkers, and attorneys--view him with suspicion and caution, inquiring about his whereabouts and his prior involvement in the children's lives.

Those doubts, in turn, raise complicated questions about his legal rights to his children.

- Does the Constitution give him any rights to his children and is he entitled to a presumption of parental fitness?
- Did he preserve those rights?
- Does state law grant him stronger protections?
- Is the court permitted to place the children in foster care if no allegations of unfitness are made against him?

As a practitioner working in the child welfare system, you're likely to face this scenario. The largest percentage of child victims of abuse and neglect come from households headed by single mothers. Consequently, dependency proceedings frequently focus on reunifying children with their mothers. [1] The child welfare system frequently responds to this dynamic by treating fathers as legal strangers to their children and minimizing the importance of their rights. Often, involving fathers is an afterthought. Evidence reveals that child welfare caseworkers, courts, and attorneys typically do an inadequate job of locating nonresident fathers at the outset of a case, involving them once identified, and ensuring their constitutional and statutory rights are fully protected. [2]

But a growing consensus has emerged that disempowering fathers in this way harms children, who generally benefit when both parents participate in their lives. [3] Engaging fathers in their children's lives is linked to improved physical and mental health, self-esteem, responsible sexuality, emotional maturity and financial security for children. [4] In contrast, children in homes without fathers tend to experience high rates of poverty at an earlier age, and are more likely to have problems in school and/or become involved with the criminal justice system. [5] Additionally, involving fathers in the child protection process increases potential placement options for children in foster care as the father may successfully gain custody or help identify paternal relatives who may be willing to care for the child. Fathers may also help support their children financially. Efforts are underway across the country to transform child welfare systems to recognize rights of fathers and develop practices and procedures to help them participate in the child welfare process.

This article is the first in a series on best practices to engage nonresident fathers. It helps practitioners protect nonresident fathers' constitutional rights. After briefly reviewing parents' constitutional rights, the article provides a framework to assess

whether a nonresident father has perfected these rights and taken steps to preserve them. The article then discusses states' efforts to adjudicate the rights of nonresident fathers and encourages attorneys to determine if those efforts are constitutional. Zealous advocacy will help ensure the child protection system validates the meaningful *130 relationships between nonresident fathers and their children.

Preserving Constitutional Rights of Nonresident Fathers

Your first task as a practitioner working with nonresident fathers is to determine whether the father's relationship with his child is constitutionally protected because of the procedural protections that result if constitutional rights exist. The Supreme Court has recognized a birth parent's right to direct the upbringing of his or her child as a fundamental liberty interest protected by the Fourteenth Amendment of the United States Constitution.[6] Described as "one of the oldest of the fundamental liberty interests,"[7] the parental right has been applied to protect many parental decisions. For example, it prevents the state from directing a child's religious upbringing,[8] choosing with whom the child should associate,[9] and making medical decisions for the child.[10] These holdings rest on the premise that the "natural bonds of affection lead parents to act in the best interests of their children."[11]

Parents' Constitutional Rights in Child Welfare Proceedings

In child protection cases, this right has fueled constitutionally-based procedural protections for parents. If the state seeks to remove a child from the home, an emergency hearing must be held promptly and the state must prove why removal is necessary. Before the state assumes extended custody of the child, a finding of unfitness is required. The parent must receive adequate notice and a meaningful opportunity to be heard at the hearing where this finding is made.[12] Before the state terminates parental rights, it must prove parental unfitness by clear and convincing evidence[13] at a hearing. Due process may mandate appointing counsel to represent the parent at this hearing.[14] Thus, resolving this threshold question--whether the nonresident father's relationship with his child is constitutionally-protected--is crucial in determining if he is entitled to other constitutional protections, all of which trump conflicting federal and state statutes.

Assessing if Federal Constitutional Rights Exist

How do you determine whether a nonresident father is entitled to constitutional protections?

Parental Involvement

The Supreme Court has answered this question by looking at the level of involvement of the nonresident father in his child's life. "When a father demonstrates a full commitment to the responsibilities of parenthood by coming forward to participate in the rearing of his child, his interest in personal contact with his child acquires substantial protection under the Due Process Clause."[15] For example, in *Lehr v. Robertson,* the Supreme Court upheld a New York statute that did not require a father to be notified of his child's impending adoption because the father did not take meaningful steps to establish a parental relationship with his child.[16] The Court reasoned:

> *134 The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the

> Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie. [17]

Similarly, in *Quilloin v. Walcott*, the Court held that a birth father, who had minimal contact with the child, could not disrupt a child's adoption into a family with whom the child had already been living. [18] In both decisions, the Supreme Court prevented fathers who had not made efforts to establish a relationship with their children from using the Constitution to disrupt the child's permanent placement.

But when the father has such a relationship, the Court has prevented states from infringing on the father-child bond without providing adequate process. In *Caban v. Mohammed*, the Court struck down a New York statute that denied a father the right to object to an adoption to which the biological mother had already consented. [19] The Court held that since the father was as involved in the children's upbringing as their mother, they both had to be treated equally. [20] Although the Supreme Court has never proscribed the specific actions a nonresident father must take to perfect his constitutionally-protected interest in his child, the Court's rulings clarify that the rights of fathers who have established relationships with their children are constitutionally protected from state interference absent proof of unfitness.

Paternity Establishment

Additionally, the Supreme Court has held that due process requires states to give all fathers the opportunity to establish parental relationships by allowing them to claim their interest in the child soon after the child's birth. [21] States have created several ways for fathers to assert parentage. In some states, fathers have to file an affidavit of paternity jointly with the child's mother or institute a paternity suit. Others use putative father registries to let fathers assert their interests. State practices vary on this issue; as the father's attorney, you will need to know these differences. Most appellate courts find a father's failure to comply with state procedures constitutes a permanent waiver of the father's rights to his child. [22]

Exceptions

Extending substantial protections to a birth father who has a relationship with his child and allowing all fathers an opportunity to claim their parental interest soon after the child's birth are well-established principles. The only exception is when, under state law, another man, typically the husband of the child's mother, has been designated the child's legal father. A number of states have strong presumptions that the husband of the child's mother is the legal father if the child was born during the marriage. In these states, even if another man claims to be the child's birth father, he does not have any standing to assert his rights since the law recognizes someone else as the child's legal father. This statutory scheme was challenged in *Michael H. v. Gerald D.*, where the Supreme Court, in a split decision, affirmed these statutes. [23] Be aware of the intricacies of your state's paternity laws to decide how your clients' rights may be impacted if ***135** another man claims to have a parental relationship with the child. For example, some jurisdictions, like Louisiana, have allowed courts to permit dual paternity in limited situations. [24]

Practice Tips

How do these constitutional principles translate into good practice? Once the nonresident father is identified, you will need to determine his prior involvement in the child's life.

- Did he pay child support? When, and how frequently?
- How often did he visit the child?

• Did he provide the child's mother any assistance during her pregnancy?

• Did he send gifts and/or cards to the child?

• Did he attend school meetings or take the child to doctor appointments?

• Is his name on the birth certificate?

Answering these questions will flesh out whether the father developed the type of relationship with his child that courts deem constitutionally-protected. If a relationship exists, the father is guaranteed the due process protections noted above, regardless of conflicting state and federal laws, unless state law has designated another person as the child's legal father. If no other legal father exists, the father must be given notice and an opportunity to be heard and the state cannot interfere with his custodial rights absent proof of unfitness. His rights to the child are substantial and state encroachment must be justified by compelling reasons.

If a relationship does not exist, assess whether the father's opportunity to establish a parental relationship was blocked in any way.

• Does state law provide adequate mechanisms for the father to become involved in the child's life?

• Did the child's mother in some way prevent the father from developing a relationship with the child?

• Did the father make all reasonable efforts to form a parental relationship?

• Was the child taken into state care almost immediately after birth (e.g., from the hospital)?

If evidence shows the father never had a meaningful opportunity to create a parental bond with his child, you could argue that the Constitution requires that he be given the opportunity. In *Lehr*, the Supreme Court specifically analyzed whether state law protected a father's right to form such a relationship. Evidence of fraud or concealment on the part of the mother or the state agency may help persuade a judge to give the father an opportunity to assert his rights. When representing nonresident fathers, ensure that the constitutional protections given to all parents are afforded to those fathers whose prior actions merit such protection.

Determining if State Law Protects Fathers' Rights

Assuming the nonresident father has perfected his constitutional rights to his child, you must next determine whether provisions under state law are constitutional.

• Does state law provide him with notice and an opportunity to be heard about his child's custody?

• Does it give him a presumption of parental fitness?

If not, the state may have impermissibly encroached upon his rights based solely on a subjective determination of what is best for his child.

Thoroughly understanding the interplay between constitutional rights and state statutory provisions is crucial in vindicating the rights of nonresident fathers. Generally, most states provide nonresident fathers basic procedural rights to:

• notice of proceedings and opportunity to participate

• visitation with children

*136 • court-appointed counsel if indigent

But states vary considerably on two key issues: 1) whether the child must be placed with the nonresident father absent proof of unfitness, and 2) whether the court can order a fit nonresident father to comply with services it deems are in the child's best interests. Differing state approaches to these issues are described below.

No Parental Presumption

A number of states, such as Michigan and Ohio, have policies permitting courts to deprive nonresident fathers of custodial rights to their children immediately upon an adjudication or plea finding that the mother abused or neglected them.[25] In these jurisdictions, immediately upon a finding against one parent, the trial court obtains custody of the child and can issue any order it deems is in the child's best interest. Even absent a finding of unfitness against the nonresident father, the court can place the child in foster care, compel the nonresident father to comply with services, and order that the father's rights be terminated based on failure to comply with those services. These systems treat nonresident fathers as legal strangers to the child, and the burden is on them to prove to the court it is in the child's best interest to be placed with them.

Deprivation of Legal Custody

Other jurisdictions have adopted a more nuanced approach while continuing to deprive nonresident fathers of full custodial rights.[26] In these courts, judges recognize the constitutionally-based parental presumption but only apply the presumption to the physical custody of the child. Absent a finding of unfitness, nonresident fathers are granted physical custody of their children, but the court still retains legal custody. That is, the court makes decisions about the child and can order the nonresident father to comply with services. While safeguarding the physical custody rights of nonoffending parents, these systems restrict their legal custody.

No Jurisdiction

Finally, two states, Maryland and Pennsylvania, have adopted a completely different approach.[27] In those states, if a nonresident father is willing to immediately assume care and custody of the child and is not unfit, the court may not assume jurisdiction over the child for any purpose, even to offer services to the offending parent or the child. The juvenile court must dismiss the case and the only limited action it may take is to grant custody to the nonresident father before dismissal. Once the custody transfer is made, all court involvement or oversight will end.

As the brief discussion above shows, states differ significantly on whether the nonresident father has a presumptive right to custody of his child and whether he can be forced to comply with services.[28] If a state's *137 practices conflict with the procedural protections guaranteed by the Constitution, it is essential to file all necessary pleadings to safeguard such rights. These may include:

• making a request at the detention or shelter care hearing for immediate placement of the child with the father.

• filing a motion challenging the imposition of services on your client absent a finding of unfitness.

• arguing that if a fit nonresident father requests custody, then the court cannot interfere with his custodial rights in any way.

Appeals of trial court decisions should be taken immediately, as opposed to waiting until after the father's rights are terminated because, at that point, many of the challenges may be moot or be deemed waived by the court. Of course, the specific arguments that you should make in a given case will depend on the wishes and interests of the client. Always remember to evaluate whether the decisions made by the court and the child welfare agency protect fathers' constitutional rights.

Conclusion

Traditionally, the basic constitutional rights of nonresident fathers in child welfare cases have been given short shrift. As an advocate for nonresident fathers, you can change this dynamic by challenging practices that violate the basic procedural protections that the Constitution provides many fathers. By doing so, the child protection system will begin opening its doors more widely to invite fathers to actively plan for their children's well-being.

Key Supreme Court Cases

- *Stanley v. Illinois*, 405 U.S. 645 (1972).
- *Quilloin v. Walcott*, 434 U.S. 246 (1978).
- *Caban v. Mohammed*, 441 U.S. 380 (1979).
- *Lehr v. Robertson*, 463 U.S. 248 (1983).
- *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

Nonresident Father Involvement: Key Statistics

In a multistate study, researchers conducted telephone interviews with 1,222 caseworkers in Arizona, Massachusetts, Minnesota, and Tennessee. Caseworkers were interviewed about 1,958 children in their caseloads, each of whom had a living father who did not reside in the household from which the child was removed. The study found:

- 72% of caseworkers noted that paternal involvement enhanced child well-being
- 68% of fathers were identified by the caseworker
- 55% of fathers were actually contacted by the caseworker
- 50% of those fathers contacted expressed interest in their child living with them
- 56% of contacted fathers (30% of all fathers in the study) visited their child
- 50% of contacted fathers (28% of all fathers in the study) expressed interest in assuming custody of their child
- 4% of cases involving nonresident fathers had a goal of reunification with the father

Source: *What About the Dads: Child Welfare Agencies' Efforts to Identify, Locate, and Involve Nonresident Fathers* (2006). Available at: http:// aspe.hhs.gov/hsp/06/CW-involve-dads/index.htm

Benefits of Nonresident Father Involvement

A multistate study using administrative data supplied by each of the states that participated in the original *What About the Dads* study examined case outcomes for the children whose caseworkers were previously interviewed. This study found that children whose fathers were more involved:

- had a higher likelihood of reunification and lower likelihood of adoption;
- were discharged from foster care more quickly than those with less or no paternal involvement; and
- had substantially lower likelihood of subsequent maltreatment allegations.

Source: *More About The Dads: Exploring Associations between Nonresident Father Involvement and Child Welfare Case Outcomes* (2008). Available at: http://aspe.hhs.gov/hsp/08/moreaboutdads/

Tips for Agency Attorneys

Child welfare agency attorneys also have an important role to play in ensuring that fathers' constitutional rights are protected. You can:

- Ensure the nonresident father is identified and located early in the case and receives notice of all child protective proceedings.
- Ensure the child welfare agency conducts comprehensive assessments of nonresident fathers (and any paternal relatives who express interest) immediately after they request custody or visitation.
- Encourage caseworkers to include the father in his child's case plan, focus on his strengths, and offer him appropriate services.
- If no evidence of parental unfitness exists, counsel the child welfare agency that the father has a constitutional right to obtain custody over his child.
- Ensure court orders and agency practices do not hinder the father's right to visit with his child without proof that it may harm or endanger the child's safety or well-being.

Remember that all parties in child welfare proceedings need to work together to ensure that constitutional rights are respected, delays and appeals are minimized, and reunification or other permanency outcomes are achieved promptly.

Additional Resources

- Greene, Angela. "The Crab Fisherman and His Children: A Constitutional Compass for the Non-Offending Parent in Child Protection Cases." *Alaska Law Review* 24, 2007, 173, 181-199.
- Harris, Leslie Joan. "Involving Nonresident Fathers in Dependency Cases: New Efforts, New Problems, New Solutions." *Journal of Family Studies* 9, 2007, 281, 307.
- Sankaran, Vivek S. "But I Didn't Do Anything Wrong: Revisiting The Rights Of Non-Offending Parents In Child Protection Proceedings." *Michigan Bar Journal,* March 2006, 22.

Footnotes

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1 For a comprehensive study of paternal involvement in child welfare cases, *see* Sonenstein, F., K. Malm and A. Billing. *Study of Fathers' Involvement in Permanency Planning and Child Welfare Casework.* Washington, D.C.: The U.S. Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation, 2002. <http://aspe.hhs.gov/hsp/CW-dads02>

2 *See* Malm K., J. Murray and R. Geen. *What About the Dads? Child Welfare Agencies' Efforts to Identify, Locate and Involve Nonresident Fathers.* Washington, D.C.: The U.S. Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation, 2006, which explores the reasons why child welfare agencies have traditionally excluded fathers from the case-planning process. <http://aspe.hhs.gov/hsp/06/CW-involve-dads/index.htm>

3 For an analysis of the ways that paternal involvement in child welfare cases enhances child well-being, see Malm, K., E. Zielewski and H. Chen. *More About the Dads: Exploring Associations Between Nonresident Father Involvement and Child Welfare Case Outcomes.* Washington, D.C.: U.S. Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation, 2008. <http://aspe.hhs.gov/hsp/08/moreaboutdads/index.htm>.

4 *See* Horn, W. and T. Sylvester. *Father Facts: Fifth Edition,* Gaithersburg, MD: National Fatherhood Initiative, 2007.

5 National Child Welfare Resource Center for Family-Centered Practice. "Father Involvement in Child Welfare: Estrangement and Reconciliation." *Best Practice/Next Practice: Family Centered Child Welfare,* Summer 2002.

6 Meyer v. Nebraska, 262 U.S. 390 (1923).

7 Troxel v. Granville, 450 U.S. 57, 65 (2000).

8 Wisconsin v. Yoder, 406 U.S. 205 (1972).

9 Troxel, 450 U.S. at 57.

10 Parham v. J.R., 442 U.S. 584, 603 (1979).

11 Ibid., 603.

12 Stanley v. Illinois, 405 U.S. 645 (1972).

13 Santosky v. Kramer, 455 U.S. 745 (1982).

14 Lassiter v. Dep't of Social Services, 452 U.S. 18 (1981).

15 Lehr v. Roberstson, 463 U.S. 248, 261 (1983).

16 Ibid., 248.

17 Ibid., 262.

18 Quilloin v. Walcott, 434 U.S. 246, 255 (1977).

19 Caban v. Mohammed, 441 U.S. 380 (1979).

20 Ibid., 389.

21 Lehr, 463 U.S. at 262-263.

22 *See, e.g.*, Marco C. v. Sean C., 181 P.3d 1137 (Ct. App. Az. 2008); Heidbreder v. Carton, 645 N.W.2d 355 (Minn. 2002); Hylland v. Doe, 867 P.2d 551 (Or. Ct. App. 1994); Sanchez v. L.D.S. Social Services, 680 P.2d 753 (Utah 1984) (all refusing to permit fathers to assert parental rights where they did not comply with statutory requirements).

23 Michael H. v. Gerald D., 491 U.S. 110 (1989).

24 Smith v. Cole, 553 So. 2d 847 (La. 1989).

25 For Ohio cases, *see, e.g.*, In re C.R., 843 N.E.2d 1188 (Ohio 2006); In re Russel, 2006 Ohio App. LEXIS 6565 (Ohio Ct. App. 2006); In re Osberry, 2003 Ohio App. LEXIS 4922 (Ohio Ct. App. 2003). Michigan's approach is exemplified in the following cases: In re Church, 2006 Mich. App. LEXIS 1098 (Mich. Ct. App. 2006); In re Camp, 2006 Mich. App. LEXIS 1620 (Mich. Ct. App. 2006); In re Stramaglia, 2005 Mich. App. LEXIS 1339 (Mich. Ct. App. 2005).

26 *See, e.g.*, J.P. v. Dep't of Children and Families, 855 So. 2d 175 (Fla. Dist. Ct. App. 2003); In re Jeffrey P., 218 Cal. App. 3d 1548 (Ct. App. 1990).

27 *See, e.g.*, In re M.L., 757 A.2d 849 (Pa. 2000); In re Russell G., 672 A.2d 109 (Md. Ct. Spec. App. 1996).

28 None of these states specifically distinguish between mothers and fathers. However, in practice, these different approaches typically affect the noncustodial parents who most often are fathers.

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EXHIBIT E

Not Reported in N.W.2d, 2012 WL 6097295 (Mich.App.)
(Cite as: 2012 WL 6097295 (Mich.App.))

H

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED

Court of Appeals of Michigan.
In re MAYS, Minors.

Docket No. 309577.
Dec. 6, 2012.

Wayne Circuit Court, Family Division; LC No. 09-485821-NA.

Before: MURRAY, P.J., and CAVANAGH and STEPHENS, JJ.

PER CURIAM.

*1 In this child protective proceeding case, respondent W. Phillips appeals a circuit court order, following a permanency planning hearing, that continued the minor children's placement in foster care and denied respondent's motion for placement of the children with him and dismissal of the trial court's jurisdiction. The order was entered during proceedings on remand after our Supreme Court reversed an order terminating respondent's parental rights. [FN1] *In re Mays*, 490 Mich. 993; 807 NW2d 307 (2012). We affirm.

FN1. Although respondent initially filed a claim of appeal from the trial court's order, this Court, in response to a jurisdictional challenge in the children's brief on appeal, concluded that it lacked jurisdiction by right because the order was not a final order defined in MCR 3.993(A), but "that the claim of appeal is treated as an application for leave to appeal and leave to appeal is GRANTED." *In re Mays*, unpublished order of the Court of Appeals, entered July 25, 2012 (Docket No. 309577).

The Department of Human Services (DHS) filed a petition for temporary custody of the children in March 2009. The petition alleged that the children were living with their mother, respondent U. Mays, who had left them home alone, and that respondent had stated that he was unable to care for the children at that time and that their best placement would be with their grandmother. The court acquired jurisdiction over the children in April 2009 when respondent Mays entered a plea of admission to the allegations in the petition. The trial court held a dispositional hearing in May 2009. It continued the children in alternative placement and directed the parents to participate in reunification services.

In December 2009, the DHS filed a supplemental petition to terminate each parent's parental rights. Following a hearing, the trial court terminated the parents' parental rights. Although this Court affirmed that decision, *In re Mays*, unpublished opinion per curiam of the Court of Appeals, issued November 23, 2010 (Docket Nos. 297446, 297447), our Supreme Court subsequently reversed the order terminating respondent's parental rights, holding that "the trial court clearly erred in concluding that a statutory basis existed for termination of respondent's parental rights" and that the trial court erred in finding that termination was in the children's best interests when the factual record was inadequate to make a best interests determination. *In re Mays*, 490 Mich. at 993-994.[FN2] Although the Supreme Court had previously directed the parties to address the constitutionality of the so-called "one parent" doctrine first adopted in *In re CR*, 250

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Mich.App. 185; 646 NW2d 506 (2002), the Court ultimately declined to consider that issue because respondent had not raised it in his appeal to this Court. *In re Mays*, 490 Mich. at 994.

> FN2. In a separate order, the Supreme Court also reversed the termination of respondent Mays' parental rights. *In re Mays*, 490 Mich. 997; 807 NW2d 304 (2012).

Once the case returned to the trial court, respondent filed a motion for termination of the court's jurisdiction over the children or to return the children to his custody. He argued that the trial court had violated his due process rights when it utilized the one parent doctrine recognized in *In re CR* to take jurisdiction over the children because it deprived him of custody without a determination of unfitness. The trial court disagreed and denied the motion.

Respondent now argues on appeal that the trial court's continued exercise of jurisdiction over the children based solely on respondent Mays' plea, without an adjudication of unfitness with respect to him, violates his constitutional right to due process. After de novo review of this constitutional issue, we disagree. See *County Rd Ass'n of Mich. v. Governor*, 474 Mich. 11, 14; 705 NW2d 680 (2005).

*2 The concept of due process is flexible, and analysis of what process is due in a particular proceeding depends on the nature of the proceeding, the risks involved, and the private and governmental interests that might be affected. *In re Brock*, 442 Mich. 101, 111; 499 NW2d 752 (1993). "The essence of due process is fundamental fairness." *In re Adams Estate*, 257 Mich.App 230, 233–234; 667 NW2d 904 (2003) (internal quotation marks and citation omitted). Procedural due process requires that a party be provided notice of the nature of the proceedings and an opportunity to be heard by an impartial decision maker at a meaningful time and in a meaningful manner. *Reed v. Reed*, 265 Mich.App 131, 159; 693 NW2d 825 (2005). The opportunity to be heard requires a hearing at which a party may know and respond to the evidence. *Hanlon v. Civil Serv Comm*, 253 Mich.App 710, 723; 660 NW2d 74 (2002).

"[P]arents have a significant interest in the companionship, care, custody, and management of their children. This interest has been characterized as an element of 'liberty' to be protected by due process." *In re Brock*, 442 Mich. at 109. A parent's interest in his children "warrants deference and, absent a powerful countervailing interest, protection." *Stanley v. Illinois*, 405 U.S. 645, 651; 92 S Ct 1208; 31 L.Ed.2d 551 (1972). Conversely, the state has a legitimate interest in protecting children who are neglected or abused by their parents. *Id.* at 652; *In re VanDalen*, 293 Mich.App 120, 132–133; 809 NW2d 412 (2011). But "so long as a parent adequately cares for his ... children (*i.e.*, is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Troxel v. Granville*, 530 U.S. 57, 68–69; 120 S Ct 2054; 147 L.Ed.2d 49 (2000). A parent is constitutionally entitled to a hearing on his fitness before his children are removed from his custody. *Stanley*, 405 U.S. at 658. "A due-process violation occurs when a state-required breakup of a natural family is founded solely on a 'best interests' analysis that is not supported by the requisite proof of parental unfitness." *In re JK*, 468 Mich. 202, 210; 661 NW2d 216 (2003).

Child protective proceedings are initiated by the filing of a petition. MCR 3.961(A). A petition is a complaint alleging "that a parent, guardian, nonparent adult, or legal custodian has harmed or failed to properly care for a child[.]" MCR 3.903(A)(20). "[T]he parent, guardian, nonparent adult, or legal custodian who is alleged to have committed an offense against a child" is a respondent. MCR 3.903(C)(10). An offense against a child is "an act or omission by a

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parent, guardian, nonparent adult, or legal custodian asserted as grounds for bringing the child within the jurisdiction of the court" under MCL 712A.2(b). MCR 3.903(C)(7).

*3 The procedures outlined by the Juvenile Code and the court rules protect a parent's due process rights. They permit the court to issue an order to take a child into custody when a judge or referee finds from the evidence "reasonable grounds to believe that conditions or surroundings under which the child is found are such as would endanger the health, safety, or welfare of the child and that remaining in the home would be contrary to the welfare of the child." MCR 3.963(B)(1). Once the child is taken into custody, the parent must be notified and advised "of the date, time, and place of the preliminary hearing," which is to be held within 24 hours after the child has been taken into custody, and a petition is to be prepared and submitted to the court. MCR 3.921(B)(1); MCR 3.963(C); MCR 3.965(A)(1). If the child is in protective custody when the petition is filed, the procedures afforded at the preliminary hearing provide due process to the respondent-parents. They are informed of the charges against them and the court may either release the child to the respondent-parents or order alternative placement. MCR 3.965(B)(4) and (12)(b). Before ordering alternative placement, "the court shall receive evidence, unless waived, to establish that the criteria for placement ... are present. The respondent shall be given an opportunity to cross-examine witnesses, subpoena witnesses, and to offer proof to counter the admitted evidence." MCR 3.965(C)(1). Thus, the respondent-parents are given notice of the proceedings and an opportunity to be heard before the child can remain in protective custody.

For the court to continue the child in alternative placement and "exercise its full jurisdiction authority," it must hold an adjudicatory hearing at which the factfinder determines whether the child comes within the provisions of § 2(b). *In re MU*, 264 Mich.App 270, 278; 690 NW2d 495 (2004); *Ryan v. Ryan*, 260 Mich.App 315, 342; 677 NW2d 899 (2004). Generally, the determination whether the allegations in the petition are true, thus allowing the court to exercise jurisdiction, is made from the respondent's admissions to the allegations in the petition, from other evidence if the respondent pleads no contest, or from evidence introduced at a trial if the respondent contests jurisdiction. MCR 3.971; MCR 3.972; MCR 3.973(A); *In re PAP*, 247 Mich.App 148, 152–153; 640 NW2d 880 (2001). "The procedural safeguards used in adjudicative hearings protect parents from the risk of erroneous deprivation of their liberty interest in the management of their children." *Id.* at 153. Once jurisdiction is obtained, the case proceeds to disposition "to determine what measures the court will take with respect to a child properly within its jurisdiction and, when applicable, against any adult...." MCR 3.973(A).

There is no dispute that respondent was provided with the procedural safeguards prior to the adjudication. However, he was never adjudicated unfit; only respondent Mays was adjudicated as unfit. This Court upheld the validity of this practice in *In re CR*, in which it held that "[t]he family court's jurisdiction is tied to the children" and thus the petitioner is not required "to file a petition and sustain the burden of proof at an adjudication with respect to every parent of the children involved in a protective proceeding before the family court can act in its dispositional capacity." *In re CR*, 250 Mich.App at 205. This Court further observed that if the trial court acquires jurisdiction by a plea from one parent, the court can take measures "against any adult," MCR 3.973(A), and order the nonadjudicated parent to engage in services without alleging and proving that the nonadjudicated parent was abusive or neglectful as provided under § 2(b).[FN3] *Id.* at 202–203.

FN3. This is what is known as the so-called "one parent doctrine."

*4 The essence of respondent's argument on appeal is that the one parent doctrine violates the non-

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adjudicated parent's due process rights by depriving him of custody of his children without a determination that he is an unfit custodian, as would be established at the adjudicatory hearing. Respondent's argument conflates the adjudicatory and dispositional phases of the proceedings. The adjudicatory phase determines whether a child requires the protection of the court because he or she comes within the parameters of § 2(b). If the child comes within the scope of § 2(b), the trial court acquires jurisdiction and "can act in its dispositional capacity." It is at the dispositional hearing that the court determines "what measures [it] will take with respect to a child properly within its jurisdiction[.]" MCR 3.973(A). It can issue a warning to the parents and dismiss the petition, MCL 712A.18(1)(a), place the child in the home of a parent or a relative under court supervision, MCL 712A.18(1)(b), or commit the child to the DHS for placement, MCL 712A.18(1)(d) and (e). Before the court determines what action to take, the DHS must prepare a case service plan, MCL 712A.18f(2), and the court must "consider the case service plan and any written or oral information concerning the child from the child's parent, guardian, custodian, foster parent, child caring institution, relative with whom the child is placed, lawyer-guardian ad litem, attorney, or guardian ad litem; and any other evidence offered, including the appropriateness of parenting time, which information or evidence bears on the disposition." MCL 712A.18f(4). See, also, MCR 3.973(E)(2) and (F)(2). If the DHS recommends against placing the child with a parent, it must "report in writing what efforts were made to prevent removal, or to rectify conditions that caused removal, of the child from the home," MCR 3.973(E)(2), and identify the likely harm to the child if separated from or returned to the parent. MCL 712A.18f(1)(c) and (d). The parent is entitled to notice of the dispositional hearing, MCR 3.921(B)(1)(d), and the parties are entitled to an opportunity "to examine and controvert" any reports offered to the court and to "cross-examine individuals making the reports when those individuals are reasonably available." MCR 3.973(E)(3).

If the child is removed from the home and remains in alternative placement, the court must hold periodic review hearings to assess the parents' progress with services and the extent to which the child would be harmed if he or she remains separated from, or is returned to, the parents. MCL 712A.19(3) and (6); MCR 3.975(A) and (C). The court must "determine the continuing necessity and appropriateness of the child's placement" and may continue that placement, change the child's placement, or return the child to the parents. MCL 712A.19(8); MCR 3.975(G). Before making a decision, the court must "consider any written or oral information concerning the child from the child's parent, guardian, legal custodian, foster parent, child caring institution, or relative with whom a child is placed, in addition to any other relevant and material evidence at the hearing." MCR 3.975(E). If the child remains out of the home and parental rights have not been terminated, the court must hold a permanency planning hearing within 12 months from the time the child was removed from the home and at regular intervals thereafter. MCL 712A.19a(1); MCR 3.976(B)(2) and (3). The purpose of the hearing is to assess the child's status "and the progress being made toward the child's return home[.]" MCL 712A. 19a(3). At the conclusion of the hearing, the court "must order the child returned home unless it determines that the return would cause a substantial risk of harm to the life, the physical health, or the mental well-being of the child." MCR 3.976(E)(2). See, also, MCL 712A. 19a(5). In making its determination, "[t]he court must consider any written or oral information concerning the child from the child's parent, guardian, legal custodian, foster parent, child caring institution, or relative with whom a child is placed, in addition to any other relevant and material evidence at the hearing." MCR 3.976(D)(2). Further, "[t]he parties must be afforded an opportunity to examine and controvert written reports received by the court and may be allowed to cross-examine individuals who made the reports when those individuals are reasonably available." *Id.* As with the initial dispositional hearing, each

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parent is entitled to notice of the dispositional review and permanency planning hearings and an opportunity to participate therein. MCR 3.920(B)(2)(c); MCR 3.975(B); MCR 3.976(C).

*5 These provisions, taken together, satisfy the requirements of due process. The parent is entitled to notice of the dispositional hearing and an opportunity to be heard before the court makes its dispositional ruling. When it is recommended that the child not be placed with a parent, the court must consider whether the child is likely to be harmed if placed with the parent, which would necessarily entail a determination regarding that parent's fitness as a custodial parent. Once the court determines that the child should not be placed with the parents, it may continue the child in alternative placement or return the child to the parents depending on the circumstances of the parents and the child, again considering whether the child is likely to be harmed if placed with the parent, which would necessarily entail a determination regarding that parent's fitness as a custodial parent. Respondent does not contend that these procedures were not followed here.

Accordingly, the trial court did not violate respondent's due process rights by continuing to exercise jurisdiction over the children without subjecting respondent to an adjudication.

Affirmed.

MURRAY, P.J., (concurring).

Respondent father and his amicus curiae argue that his constitutional right to due process of law was violated when the trial court refused to place the children with him in the absence of a finding of harm or danger to the children in doing so. With respect to the procedural due process aspect of respondent's argument,[FN1] I concur with the majority opinion that the statutory procedures in place under Michigan law adequately protect a parent from having children removed from their custody during the pendency of proceedings without adequate findings. However, for the reasons expressed briefly below, it is also evident that respondent's substantive due process right was not violated given the evidence of record at the time the motion was decided on March 8, 2012.

FN1. The federal due process clause that applies to the States is contained in the Fourteenth Amendment to the United States Constitution, and provides that "[n]o State shall ... deprive any person of life, liberty, or property, without due process of law[.]" US Const, Am XIV, § 1. Although the constitutional language only references process, *People v. Sierb*, 456 Mich. 519, 522–523; 581 NW2d 219 (1998), the United States Supreme Court has held that there is both a procedural and substantive part to the Fourteenth Amendment, see *Mettler Walloon, LLC v. Melrose Twp*, 281 Mich.App 184, 197; 761 NW2d 293 (2008).

As recognized by the majority and respondent, there is no dispute that a parent has a liberty interest in raising his child that is protected by the due process clause of the United States Constitution. US Const, Am XIV, § 1; *Smith v. Org of Foster Families for Equality & Reform*, 431 U.S. 816, 842–844; 97 S Ct 2094; 53 L.Ed.2d 14 (1977). Respondent's argument is that the trial court violated this constitutional right to due process of law (which he claims to be both procedural and substantive) by refusing to place the children with him during the pendency of the proceedings without first finding that he would be a danger to the children or otherwise committed abuse and neglect against the children. In making this argument respondent challenges this Court's decision in *In re CR*, 250 Mich.App 185; 646 NW2d 506 (2002), where we held that once the circuit court acquires jurisdiction over the children it can order a parent to comply with certain orders and conditions, even if that parent was not a respondent in the proceedings, be-

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cause jurisdiction over the children was established based on a plea by the other parent. *Id.* at 202–203. However, *In re CR* addresses an issue not presented by this case. As just noted, *In re CR* stands for the proposition that a non-respondent parent may be subject to court orders and conditions even when jurisdiction over the children is based exclusively on the other parent's conduct. The issue presented in this case is whether respondent may be deprived of the custody of his children during the pendency of these proceedings absent evidence of his particular unfitness. These are substantially different issues and therefore there is no basis in this case upon which to challenge the holding of *In re CR*.

*6 Additionally, in light of the evidence presented to the trial court, it is readily apparent that the trial court's decision not to turn the children over to respondent did not violate his substantive due process right in the liberty interest he has as a parent as recognized by the United States Supreme Court. Specifically, the evidence presented showed that there was a significant factual question as to whether respondent had *any* contact with his children for a number of years prior to the February 24, 2012, hearing. At that hearing respondent testified that he most recently saw one child the previous month on her tenth birthday, and that he had seen both children "less than 10 times" in the year since his rights to the children were terminated. However, testifying directly to the contrary was his ten-year-old daughter, who testified that she did not see respondent on her tenth birthday and had not seen him in quite some time. Indeed, the child testified that she could not remember the last time she saw her father.

As a result of this testimony and the trial court's findings,[FN2] the liberty interest recognized by the due process clause as enunciated in *Stanley v. Illinois*, 405 U.S. 645; 92 S Ct 1208; 31 L.Ed.2d 551 (1972), is simply not applicable here. Indeed, the *Stanley* Court repeatedly emphasized that the interest that it was recognizing was "that of a man in the children he had sired *and raised*," and that the father "was entitled to a hearing on his fitness as a parent *before his children were taken from him*.... " *Stanley*, 405 U.S. at 649, 651. (Emphasis added.) See, also, *Stanley*, 405 U.S. at 652 ("*Stanley's* [the father] interest in *retaining* custody of his children is cognizable and substantial.") and 405 U.S. at 655 ("[N]othing in this record indicates that Stanley is or has been a neglectful father who has not cared for his children."). (Emphasis added.) Indeed, the Court in *Lehr v. Robertson*, 463 U.S. 248, 260; 103 S Ct 2985; 77 L.Ed.2d 614 (1983), quoting *Caban v. Mohammed*, 441 U.S. 380, 397; 99 S Ct 1760; 60 L.Ed.2d 297 (1979) (STEWART, J., *dissenting*), recognized that " '*[p]arental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring.*' " (Emphasis in the original.)

> FN2. Though not as elaborate as they could be, one of the findings by the trial court in denying the motion was that although there is a presumption that a parent is fit, in the present case it did not apply because, since March 2009 when the case began and February 2012, the evidence revealed that respondent had either shown no interest in, or no ability to, parent the children.

Consequently, because there was a question about whether respondent had any contact or relationship with the two children at the time the trial court was asked to place the children with him, and because the children were not being "returned" or "taken from" respondent since he did not have custody of them, and because respondent had an opportunity to present evidence on this issue at the hearing held in February 2012, the liberty interest recognized in *Stanley* was neither applicable nor violated by the trial court's decision. See *In re CAW (On Remand)*, 259 Mich.App 181, 185; 673 NW2d 470 (2003).

*7 For these reasons, I concur in the decision to affirm the trial court's order.

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